

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

JOSEPH RUFO,	.	Civil Action No. 1:18cv37
	.	
Plaintiff,	.	
	.	
vs.	.	Alexandria, Virginia
	.	November 1, 2018
ACLARA TECHNOLOGIES, LLC,	.	2:00 p.m.
	.	
Defendant.	.	
	.	
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TRANSCRIPT OF JURY TRIAL
BEFORE THE HONORABLE LEONIE M. BRINKEMA
UNITED STATES DISTRICT JUDGE

VOLUME 3 - P.M.

APPEARANCES:

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(APPEARANCES CONT'D. ON FOLLOWING PAGE)

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COMPUTERIZED TRANSCRIPTION OF STENOGRAPHIC NOTES

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THE PLAINTIFF:

Lyn Salvo	622	640	661	670
Sienna Church	673	678		
Joseph Rufo (Recalled)	689			

WITNESS ON BEHALF OF
THE DEFENDANT:

Jill Church	688			
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EXHIBITSMARKEDRECEIVEDPLAINTIFF'S:

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DEFENDANT'S:

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1 A F T E R N O O N S E S S I O N

2 (Jury out.)

3 THE COURT: All right. Mr. Fox, how many more
4 witnesses do you have?

5 MR. FOX: Just two, Your Honor.

6 THE COURT: And they are all by deposition, or are
7 they live?

8 MR. FOX: They're both live.

9 THE COURT: I'm sorry?

10 MR. FOX: They're both live, Your Honor.

11 THE COURT: All right. That's fine. So about what,
12 another hour?

13 MR. FOX: Yeah, maybe less.

14 THE COURT: All right. We gave you -- we sent, I
15 know it was late last night, a proposed charge, and then we've
16 had some -- I've tinkered with them a few more times. No one's
17 gotten back to us about the charge yet, so I'm anticipating a
18 short charging conference so we can get this case to the jury
19 today, all right?

20 MR. FOX: All right.

21 THE COURT: All right. Let's get the jury in.

22 (Jury present.)

23 THE COURT: All right. Folks, you-all can have a
24 seat.

25 Who's your next witness, Mr. Fox?

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1 MR. FOX: Lyn Salvo, Your Honor.

2 THE COURT: All right, Ms. Salvo.

3 LYN SALVO, PLAINTIFF'S WITNESS, AFFIRMED

4 DIRECT EXAMINATION

5 BY MR. FOX:

6 Q. Could you state your name for the record, please.

7 A. Lyn Salvo.

8 Q. Okay. Good afternoon, Ms. Salvo. I have a few questions
9 for you relating to the facts of this case, first starting with
10 what's your position at Aclara?

11 A. I am the senior director of HR and organizational
12 development.

13 Q. And you report to Michael Garcia, correct?

14 A. That is correct.

15 Q. Could I just very briefly hear about your duties as senior
16 director of HR?

17 A. I'm sorry?

18 Q. Could I very briefly hear what your job duties are?

19 A. Yes. As the senior director of HR, I'm the site leader
20 for the St. Louis site of about 239 employees. I am also a
21 business partner for various specific businesses within Aclara,
22 and then I also am in charge of organizational development for
23 the entire organization of Aclara.

24 Q. Okay. And is it -- you have a lot of responsibilities; is
25 that correct?

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1 A. Yes.

2 Q. Okay. And every once in a while, you said at your
3 deposition, things do fall through the cracks?

4 A. I think for the most part, things sometimes do, but not
5 always.

6 Q. How large is the Aclara organization?

7 A. Including the SGS organization, we have over a thousand
8 employees, about 1,076 the last time I checked.

9 Q. Okay. And you said at your deposition that there were,
10 676 of them were SGS installers, correct?

11 A. That sounds about right.

12 Q. The turnover rate is high for those SGS installers, is it
13 not?

14 A. Yes, it is.

15 Q. Why is that?

16 A. The turnover rate is high because it's a, it's a difficult
17 job. It's a job that requires people to be working in all
18 kinds of weather outside, working with equipment that is
19 volatile in nature in terms of electricity and gas and water
20 that, that can create safety issues, and it's, and it's not a
21 job that -- it's hard work, and it's not a job that people end
22 up staying in for a long period of time.

23 Q. Do you know anything about the racial composition of the
24 SGS installers?

25 A. I do not.

Salvo - Direct

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1 Q. You do not to this day?

2 A. I do not to this day.

3 Q. Okay. Well, do you know this: whether the SGS
4 installers, whether a large proportion of them were people of
5 color?

6 A. I do not.

7 Q. Is that not something you've investigated since this
8 lawsuit was filed?

9 A. I have not investigated that.

10 Q. Do you ever recall being given training in retaliation?

11 A. Say that again, I'm sorry?

12 Q. Do you ever recall being given training in guarding
13 against retaliation?

14 A. Yes. I have been trained and I've also done training
15 regarding retaliation in the workplace.

16 Q. You've done training yourself?

17 A. I've done training myself.

18 Q. Okay. And you're fully familiar with the policies in the
19 Aclara Code of Business Conduct governing good faith reporting
20 of potential illegal activity, correct?

21 A. Yes, I am.

22 Q. Now, do you understand that Joey Rufo was looking to you
23 for some level of mentorship in the HR arena?

24 A. I do, yes.

25 Q. And, and you would talk with him -- you talked with him

Salvo - Direct

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1 from time to time about that, right?

2 A. Yes, I have.

3 Q. And he expressed a lot of enthusiasm and exuberance; is
4 that, is that fair?

5 A. That's fair.

6 Q. And did he emit a positive vibe as an employee within the
7 organization?

8 A. When I first met him, yes, he did emit a positive vibe.

9 Q. He was never threatening with you or any other employee of
10 Aclara, was he?

11 A. He was never threatening to me, but I can't answer about
12 towards any other employee.

13 Q. I'd like you to take a look at Exhibit 22. Okay. This is
14 an e-mail from yourself dated July 7, sent at 3:10 p.m.?

15 A. Yes.

16 Q. To Joey Rufo and Gina Petrella. Can you, can you read it
17 to the jury?

18 A. It says, "Beautiful. Thanks. I will look at it more
19 closely this weekend, but great start!"

20 Q. Okay. And Joey's e-mail is below that, correct?

21 A. Joey's e-mail is below that, correct.

22 Q. Okay. And his going forward plans are identified in
23 there, correct?

24 A. What was the question? I'm sorry.

25 Q. Let me ask you this: You understood he had sent a

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1 one-page e-mail, correct?

2 A. It didn't come through my screen as one page, but yes, it
3 was -- but it was a lengthy e-mail to what I'm typically
4 accustomed to.

5 Q. Okay. Did you read Joey's e-mail before you responded?

6 A. I read about the first two lines of the e-mail just to
7 kind of understand what the gist of the e-mail was about. I
8 opened up the spreadsheet, and I looked at the spreadsheet very
9 briefly just to see the columns on the spreadsheet, and then I
10 closed it out, and I responded to him that it was a nice start
11 and I would look at it in more detail later on.

12 Q. Okay. And you did that around July 7, correct?

13 A. I did that on July 7, yes.

14 Q. Okay. And Joey gave his report a month, a month later
15 approximately, correct?

16 A. He sent, he sent the report out about a month later that
17 indicated it had all of the July statistics in it, yes.

18 Q. So you had a month to tell him not to move forward with
19 this if that was your intent, correct?

20 A. Well, when you say if that was my intent, I never went
21 back and read that e-mail in totality. I was just looking at
22 the spreadsheet based on him completing the spreadsheet as we
23 had asked him to do.

24 Q. Okay. And you gave him no further guidance other than,
25 "Beautiful. Thanks. I will look at it more closely this

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1 weekend, but great start," correct?

2 A. That is correct. I gave no further detail.

3 Q. And you never told him: No, the company doesn't want you
4 to look at the -- doesn't want you to compare the EEO
5 categories; don't do that. Right?

6 A. That is correct. I never told him not to do that, but I
7 had not seen that e-mail, either, that bottom part.

8 Q. Had you actually read the e-mail, would you have told him
9 not to perform the discrimination analysis?

10 A. I certainly would have called him to ask for more
11 clarification of what that meant.

12 Q. Okay. But you never did that, did you?

13 A. I never read that part, so no, I did not.

14 Q. And Gina Petrella, do you understand Gina Petrella's
15 practice not to read e-mails that are over a certain length?

16 MS. DURR: Objection.

17 THE COURT: Sustained.

18 BY MR. FOX:

19 Q. Do you have any practice like that, that you limit your,
20 your review of e-mails to a certain length or --

21 A. I wouldn't call it a practice. I know I get a lot of
22 e-mails, and I usually can read in the first few lines of most
23 e-mails what the content is about, and if it sounds like
24 something that I need to get into in further detail, I will
25 continue reading. If not, I usually put it aside to take care

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1 of it later.

2 Q. Okay. So let's move to Exhibit 33. This is Joey's
3 August 8 spreadsheet and EEO report, correct?

4 A. That's what it looks like, yes.

5 Q. And you recall receiving this document, don't you?

6 A. I recall receiving this document, yes.

7 Q. In around the same time it was sent, around August 8,
8 correct?

9 A. About a month after the first one, August 8, correct.

10 Q. And then you did review this e-mail accompanying the
11 document, correct?

12 A. I did but only after I was called attention to it.

13 Q. Who called it to your attention?

14 A. Gina Petrella.

15 Q. And did she indicate to you that the document disclosed
16 disparity in the treatment of non-white employees versus white
17 employees?

18 A. Not, not in those words, no.

19 Q. Did you review the content of the spreadsheet?

20 A. Not at that moment, no.

21 Q. Okay. I'd like to show you Exhibit 23. Let me just ask
22 you this first before I show you the exhibit: Did Ms. Petrella
23 ever express to you the view that Joey had displayed initiative
24 in preparing this spreadsheet?

25 A. I'm not sure I understand your question.

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1 Q. Did she ever say: Hey, Joey showed some initiative in
2 preparing this data for the company?

3 A. I don't remember those words, but I believe that in what
4 you're going to show me, that's what it says.

5 Q. I'm just asking you if you recall her ever saying that.
6 I'll move on if you don't.

7 A. I don't recall her saying that.

8 Q. Now, I'd like to take a look at Exhibit 34. Do you see
9 that?

10 A. It's not up yet.

11 Q. It will take a moment.

12 A. Okay.

13 Q. Did you review this EEO spreadsheet?

14 A. No, I did not.

15 Q. Okay. Why didn't you scrutinize this, Ms. Salvo?

16 A. I didn't scrutinize it because at that point in time, it
17 was a concern that Gina, who was our EEO and compliance
18 specialist, was looking at that, and I don't know enough about
19 these spreadsheets and the EEO analysis to be able to comment
20 on them one way or the other.

21 Q. Do you know if she scrutinized it herself?

22 A. I don't know if she scrutinized it. I know she looked at
23 it.

24 Q. Other than what Joey did, was, was any monitoring ever
25 done to determine if discipline wasn't meted out to employees

Salvo - Direct

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1 based upon race?

2 A. Any monitoring, is that what you asked?

3 Q. Yes.

4 A. Not to my knowledge.

5 Q. Has anyone looked at the issue since, anyone including
6 yourself in the organization, looked at the issue since Joey
7 made the revelations?

8 A. Not to my knowledge.

9 Q. Just so the record is clear, so far as you know, the
10 company has done no analysis of any kind, including a
11 statistical analysis, to determine whether or not it's
12 disciplining its employees who are non-white in a
13 disproportionate fashion?

14 A. If the analysis had been done, I was not made aware of it.

15 Q. And that's true to today's date, correct?

16 A. I'm not sure I --

17 Q. As we sit here in the courtroom, you're not aware of it?

18 A. Well, since I have been part of reading some of the
19 information, I've been made aware of it, yes.

20 Q. Okay. I'm simply asking you if as you sit here today,
21 you're not aware of any such analysis having been done?

22 A. As I'm sitting here today in terms of anybody saying to me
23 specifically that analysis was done, I was not made aware of
24 that.

25 Q. Okay. Now, let's take a look at Plaintiff's Exhibit 43.

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1 This is an e-mail exchange, and if you'd turn to page 2 and
2 look at the e-mail at the top of the page? We'll expand that
3 for you.

4 This is an e-mail from Jill Mecey to yourself and
5 Gina Petrella saying, "Thanks, Lyn. Gina, Lyn, and I will
6 conduct the conversation with Joey hopefully no later than
7 tomorrow morning. He is IM-ing me and is very concerned that
8 he is in trouble. I would like to have the conversation as
9 soon as possible."

10 Did you receive that e-mail?

11 A. Yes, I did.

12 Q. Okay. And do you know why Joey was afraid he was in
13 trouble?

14 A. I would guess that he's concerned he's in trouble based on
15 a conversation that he and I had.

16 Q. Okay. And did you -- were you aware that he had been told
17 he may have put the company at risk?

18 MS. DURR: Objection. There's no evidence of that.

19 THE COURT: Yeah, I'm sustaining the objection.

20 BY MR. FOX:

21 Q. Okay. Did, did you tell him he may have put the company
22 at risk?

23 A. Not that I recall, no.

24 Q. Did you tell him or did you say to anyone the company
25 needed to do damage control?

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1 A. No. I did not say that.

2 Q. Do you know what that means, damage control?

3 A. Yes.

4 Q. What does it mean in this context?

5 A. Damage control, if there is something done that needs to
6 be corrected via interviews or other courses of action, then
7 that takes place.

8 Q. Okay. Did anything like that happen in this case?

9 A. Damage control?

10 Q. Yes.

11 A. Not to my knowledge, no.

12 Q. How could Joey have put the company at risk by disclosing
13 the EEO data to yourself and Gina Petrella?

14 MS. DURR: Lack of foundation.

15 THE COURT: Sustained.

16 BY MR. FOX:

17 Q. Okay. Now, you contacted Joey to interrogate him about
18 who he had supplied the report to, correct?

19 A. I had set up a meeting with Joey so that I could better
20 understand his analysis that he had submitted to Gina and
21 myself, yes.

22 Q. And the first thing you asked him was did he send it to
23 anyone else, right?

24 A. No, that was not the first thing I asked him.

25 Q. That's something you asked him in the conversation,

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1 correct?

2 A. I did, yes.

3 Q. What was the first thing you asked him?

4 A. Who authorized him completing the information.

5 Q. And what did he tell you?

6 A. He didn't tell me anything.

7 Q. Did he refer you back to your e-mail?

8 A. No, he did not.

9 Q. Were you not aware of that e-mail at that point in time?

10 A. I was aware of the e-mail where I said, "Beautiful, great
11 start," yes.

12 Q. Okay.

13 A. But that was not an authorization for him to proceed with
14 an analysis on something I had not read.

15 Q. Did he not discuss that with you in the call, that you had
16 sent that e-mail giving him a nod?

17 A. He did not discuss that on the call.

18 Q. Did you take notes of the call?

19 A. I don't remember if I did. It was a short conversation.

20 Q. And when he asked -- he asked you if he was in trouble
21 with the call, didn't he?

22 A. He did.

23 Q. And you said, "Are you in trouble?" Then you, you
24 scoffed, right?

25 A. No, I'm not a scoffer.

Salvo - Direct

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1 Q. You're not denying you would have rephrased the question
2 and then, and then --

3 A. When he asked me if he was in trouble, I told him that I
4 did not know, that I was asking him these questions so that I
5 further understood why he completed that analysis, and I needed
6 to review those with Michael, and I would talk with him later.

7 Q. How did you conclude the call with him? Didn't you tell
8 him, "Are you in trouble? Ha"?

9 A. No, I did not.

10 Q. How did you conclude it?

11 A. I said, "Thank you for the information, and we'll be in
12 touch."

13 Q. Did you not ask him how he extracted the data?

14 A. I asked him where he got the data to complete the report.

15 Q. And he explained that to you, did he not?

16 A. He said he got it from personnel records.

17 Q. Okay. And you said to him, "Oh, well, you have a need to
18 know then," did you not?

19 A. I did not.

20 Q. You don't recall saying that?

21 A. I don't recall because I didn't say it.

22 Q. Well, you understood he, he told you he extracted the data
23 on race from the Paycom system?

24 A. No, he did not say anything. I scheduled the call. I had
25 four questions to ask him. I asked him the four questions. He

Salvo - Direct

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1 responded to me specifically on the four questions I asked. We
2 closed out the call, and that was it. He did not say what
3 you're saying he said.

4 Q. What's your understanding as to how he -- let me ask you
5 this: Is there any way to get the data on race other than
6 through the Paycom system in the company?

7 A. I don't --

8 MS. DURR: Objection. Calls for speculation.

9 THE COURT: No, if she knows. She's the head of HR.

10 THE WITNESS: Doing EEO analysis is not in my area of
11 expertise, so if I had to gather that information, I would have
12 to get some kind of counseling or coaching as to where to pull
13 information specifically for an EEO analysis.

14 BY MR. FOX:

15 Q. You're the head of the EEO, and you're telling me you
16 would need coaching to figure out where to get the data for
17 race?

18 A. For an EEO report? Yes.

19 Q. Are you familiar with the Paycom system at all?

20 A. I am familiar with the Paycom system and the WorkPlace
21 system, which are both payroll systems of the company.

22 Q. Well, you're aware that the purpose of the system is to
23 keep track of information relating to the employees, including
24 demographic data, racial data, things like that?

25 A. I am aware but I never use those systems to pull

Salvo - Direct

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1 information. I have very specific reasons to be in those
2 systems, and if I needed a race report, I would ask somebody
3 else to run it.

4 Q. And you know what "EEO" means, don't you?

5 A. Yes, I do.

6 Q. Would you expect Ms. Mecey to know that?

7 A. She's new in her position. I would not expect her to know
8 it like I would know it after 25 years.

9 Q. How long was she with the company?

10 A. She's been with the company about six years, but she's
11 been in that position for a little less than two.

12 Q. Okay. And there was a lot of discussion about the EEO
13 data when Joey released it, wasn't there?

14 A. I was involved in some of the discussion but not all of
15 the discussion.

16 Q. Now, after you talked to Joey, you reported back to
17 Mr. Garcia, correct?

18 A. Correct.

19 Q. You relayed to him your conversation with Joey, correct?

20 A. Correct.

21 Q. Okay. And you didn't conduct any further inquiry of any
22 kind as to whether Joey was authorized to access the data that
23 you used in the report, did you?

24 A. No, I did not.

25 Q. Okay. After issuing Joey a final written warning and

Salvo - Direct

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1 performance improvement plan -- which you approved, correct?

2 A. I did not issue him a final written warning. He was
3 issued a written warning with the performance improvement plan.

4 Q. You approved that, whatever it was, right?

5 A. I was involved in helping Jill draft it, yes.

6 Q. And after that, you and Jill Mecey had a follow-up call
7 with him, correct?

8 A. That is correct.

9 Q. And in that call -- and I don't want to replay it. We've
10 already spent a lot of time in this trial, and I don't want to
11 be duplicative, but did you and Jill Mecey not question Joey
12 relentlessly on with whom he had shared the EEO report?

13 A. There was a question about who he had shared his written
14 warning but not about who he shared the report with, no.

15 Q. Okay. Why were you so concerned about him talking to
16 other people, people like Alvin Jackson?

17 A. I'm not concerned that he would have talked to other
18 people about a written warning. That's certainly his choice to
19 do so, but my understanding was he shared that with Alvin
20 Jackson specific to telling him he was planning on contesting
21 that, and contesting that, I'm not sure why he wouldn't have
22 done that with his supervisor rather than go to somebody else.

23 Q. And you didn't, you didn't want him contesting it, did
24 you?

25 A. I didn't want him what? I'm sorry.

Salvo - Direct

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1 Q. Contesting it.

2 A. He could contest it if he wanted to, but sharing that with
3 somebody else without his supervisors, that was the concern.

4 Q. And he was told that they would take it -- you and Lyn
5 Mecey would take -- you and Jill Mecey would take it as his
6 resignation if he wouldn't stop doing that and stop talking
7 about the performance improvement plan?

8 A. No, that was not in the context whatsoever.

9 Q. Is that correct?

10 A. No, that is not correct.

11 Q. Now, you were also involved, were you not, in approving
12 the negative performance review that Joey was subjected to?

13 A. What do you mean by approving?

14 Q. You were aware of it, correct?

15 A. I was aware of the performance evaluation that Jill
16 completed, yes.

17 Q. And she assigned to Joey a number of 1's in critical
18 categories of evaluation like leadership, decision-making, and
19 teamwork, correct?

20 A. What I remember, yes.

21 Q. Did Jill Mecey tell you that after he was put on the PIP,
22 Joey had alerted her that he felt that it was retaliation?

23 A. I don't recall her saying that to me directly, no.

24 Q. Well, you learned -- did you learn he had raised a
25 complaint about retaliation before this lawsuit, after he was

Salvo - Direct

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1 put on the PIP?

2 A. Before the lawsuit?

3 Q. Yes.

4 A. No.

5 Q. You became aware of this lawsuit shortly after it was
6 filed; is that correct?

7 A. Yes.

8 Q. Now -- and you were aware that Joey was fired after a
9 lawsuit was filed, correct?

10 A. His job was eliminated --

11 Q. Did you raise --

12 A. -- after some time.

13 Q. -- or register some concerns as the head of HR around the
14 fact that Joey had filed a lawsuit for retaliation that was
15 still pending at the time that he was let go?

16 A. Did I voice any concern?

17 Q. Yes.

18 A. No, I did not.

19 Q. It did not concern you that that could be viewed as a
20 separate, new act of retaliation?

21 A. It did not concern me based on the reason for the position
22 elimination.

23 Q. Did anyone ever perform an internal investigation of
24 Joey's initial charges of retaliation?

25 A. Not to my knowledge.

Salvo - Cross

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1 Q. By the way, if an employee is threatening to their
2 supervisor, is that something that would have been reported to
3 you typically, assuming you were over the supervisor?

4 A. Say that question one more time? I'm sorry.

5 Q. If an employee had been threatening to their supervisor,
6 is that something you'd find out about for supervisors in your
7 group?

8 A. If the supervisor reported it to me.

9 Q. Okay. You would expect a supervisor to report any
10 threatening behavior, would you not?

11 A. I can expect it, but it doesn't necessarily mean that
12 somebody's going to report it to me, no.

13 Q. So if someone engaged in threatening behavior, would that
14 be something as to which the company would take serious action
15 against that employee typically?

16 A. Yes.

17 Q. Now, based upon your interactions with Joey, did he seem
18 to you like the kind of person who'd be threatening?

19 A. I can't answer that. I've never been in a situation where
20 I might do something that he would want to threaten me.

21 MR. FOX: I have no further questions. Thank you.

22 THE COURT: All right. Cross-examination?

23 CROSS-EXAMINATION

24 BY MS. DURR:

25 Q. First of all, you testified that right now, there's 766

Salvo - Cross

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1 SGS installers. Do you know how many installers there were at
2 the end of July 2017?

3 A. At the end of July, there were about 350-some-odd
4 installer numbers.

5 Q. Okay. I wanted to quickly talk about the e-mail that's
6 Plaintiff's Exhibit 22. No, I'm sorry, oh, 22A. My apologies,
7 I'm looking at the wrong exhibit. 22A -- or 22, excuse me.

8 Now, at the bottom of this lengthy e-mail from
9 Mr. Rufo is his paragraph that talks about going forward,
10 right?

11 A. Correct.

12 Q. Okay. When you talked to Mr. Rufo on August -- about
13 August 10, I think you testified to, and you had the four
14 questions, and one of them was who authorized you to do this
15 report --

16 A. Yes.

17 Q. -- did you have in your mind -- were you, were you aware
18 of this "Going forward" e-mail when you had that call with
19 Mr. Rufo?

20 A. I don't remember the exact date. I became aware of it
21 somewhere around that time, but when I talked to him, I was not
22 aware, I believe, of that particular statement.

23 Q. When you called Mr. Rufo on August 10, did you think you
24 had authorized him to do any kind of EEO report?

25 A. I -- no, I did not authorize him to do any. I wouldn't do

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1 any. I wouldn't ask an office coordinator to do it.

2 Q. But you had assigned -- you and Gina had assigned Mr. Rufo
3 to do some sort of a spreadsheet, right?

4 A. Correct. Yes.

5 Q. Okay. And it was to track discipline?

6 A. It was to track discipline. Yes, correct.

7 Q. Okay. For what population within SGS?

8 A. For the installers.

9 Q. Okay. So it wasn't for the entire population of SGS?

10 A. No. It was for the installers.

11 Q. Okay. When you, when you talked to Mr. Rufo on
12 August 10 and asked him who authorized the e-mail, did he
13 mention your e-mail to you, saying: Hey, Lyn, you did it. You
14 authorized me to do it?

15 A. No, he did not.

16 Q. During that call with you, did he say anything to you
17 about that I think I'm -- I think that there's potential
18 discrimination?

19 A. No, he did not.

20 Q. Are you certain about that?

21 A. I am 100 percent certain about that.

22 Q. Okay. Did he tell you that he thinks there's a clear
23 majority of the discipline that passed my desk seemed to
24 involve employees who were either black or multiracial?

25 A. No, he did not.

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1 Q. Did he talk anything about, you know, disparity could be
2 indicative of potential intentional systemic discrimination?
3 Did he use those words?

4 A. I'm sorry, no, he did not.

5 Q. Are you certain of that?

6 A. I am very certain that he did not.

7 Q. Is it possible that you misunderstood and he said
8 something similar but he didn't use quite those words?

9 A. No. As I said, I had four questions to ask him. I asked
10 him. He replied directly to those questions, and the call was
11 ended.

12 Q. Okay. Did he tell you that, well, you know, I've been
13 seeing a trend since I started doing this tracking of
14 discipline in June, and that's continued unabated since?

15 A. No, he did not.

16 Q. Did you -- did he tell you -- well, strike that.

17 Did you ask him: What do the numbers mean?

18 A. I don't recall asking him that question, no.

19 Q. Okay. Did -- do you remember if he said anything like:
20 No, numbers, this means that employees who self-identify as
21 black or multiracial are greatly overrepresented?

22 A. No, he did not say anything like that.

23 Q. Did he say in the call: I said employees who
24 self-identify as white are greatly underrepresented in Aclara's
25 disciplinary action?"

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1 A. No, he did not say anything like that.

2 Q. Did you ask him if he had access to employees' salary
3 information?

4 A. No, I did not.

5 Q. Okay. Did you ask if he had any previous experience doing
6 analysis?

7 A. Yes, I did.

8 Q. Okay. And what did he tell you?

9 A. He told me that at a former job, he had done analysis --
10 similar analysis.

11 Q. Did he tell you that he had done EEO analysis?

12 A. No. Not specifically, no.

13 Q. Did he explain further or did you ask any further
14 questions about what kind of analysis he had done at his
15 previous job?

16 A. I don't recall, but I did ask him if he had experience in
17 statistics and had taken statistician type of classes or was
18 aware of that.

19 Q. And what did he say?

20 A. He -- I don't remember his response.

21 Q. Okay. And then did he ask you then, "Am I in trouble or
22 something?"

23 A. He asked me if he was in trouble.

24 Q. Okay. And what did you say?

25 A. I told him that, the phone call, I needed to determine and

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1 understand the analysis that he had provided us, and I told him
2 I was going to take the information and his answers from the
3 questions and review them with my supervisor.

4 Q. Okay. And then did you have any follow-up calls with
5 Mr. Rufo about the EEO report?

6 A. I did not.

7 Q. Okay. Now, I know you testified that you weren't aware if
8 the company had done any further analysis. Is it possible they
9 had done any further analysis?

10 A. It is possible, but again, since that EEO doesn't fall
11 under my areas of specialty, they might not have brought me
12 into that conversation.

13 Q. Okay. Now, now, you testified that you were aware of the
14 performance review?

15 A. Yes.

16 Q. Mr. Rufo's performance review?

17 A. I was aware of it, yes.

18 Q. Okay. And were you involved in the preparation of that
19 performance review?

20 A. No, I was not.

21 Q. Okay. When did you first see the performance review?

22 A. The performance review process is something that I oversee
23 for the entire organization, so I do get an opportunity to
24 review documents and review reports related to ratings of
25 employees.

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1 Q. Okay. Well, when did -- did you see Mr. Rufo's
2 performance review before it was finalized and given to him, or
3 was it after?

4 A. I don't remember, but I do know what his scoring was. I
5 do know what his overall performance was prior to the
6 completion of the performance appraisal process for the
7 company.

8 Q. Well -- okay. I want to turn your attention to
9 Plaintiff's Exhibit 72 -- oh, no, excuse me, that's the
10 wrong -- it's 78.

11 A. Okay.

12 Q. Okay. On the second page and third page, there's scores
13 of competencies -- in Section 2, competencies?

14 A. Yes.

15 Q. Employee rating.

16 A. Yes.

17 Q. First of all, so you know, this is -- let's -- before we
18 go into that, this -- there's been testimony that this
19 performance review was given to Mr. Rufo by Ms. Mecey in April
20 of 2018.

21 A. Okay.

22 Q. And for this year, which was the 2017 performance review
23 year, was that unusual, to be late for managers to be giving
24 reviews?

25 A. Typically, typically, it would be. We were running very

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1 behind on performance appraisals that year. We weren't
2 finishing up until December and later. Managers may have
3 completed scoring, but some of the reviews weren't reviewed
4 with the employee until a later time period. Not what we
5 prefer but that's -- that year was kind of tough on us.

6 Q. Do you know why it was kind of tough?

7 A. Well, there were some negotiations or some understanding
8 of kind of having Hubbell purchase us, and there were a lot of
9 departments, HR included and finance, that were working on
10 these integration plans, and it created a lot of extra work
11 where unfortunately, for lack of better terms, it may not have
12 been of a higher priority of getting this done.

13 In terms of reviewing them with employees, the scores
14 were done, but not reviewing them with the employees until
15 later.

16 Q. Okay. Do you know if that was something that besides Jill
17 Mecey, that other managers were late on doing?

18 A. Yeah. Sorry, yes.

19 Q. Okay. So you said that you reviewed these scores on the
20 competencies. At the end of the day, was Mr. Rufo a high,
21 medium, or low performer?

22 A. Based on these scores, he would have been a low performer.

23 Q. Okay. Now, just so we can understand the scores, on page
24 2, under the competencies, when Ms. Mecey gave -- and Ms. Mecey
25 gave Mr. Rufo a 3 for professional knowledge. Is that a low

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1 score?

2 A. No. According to our scale, that would have been --
3 scores go from 1 to 5. 5 would be certainly exceeds
4 expectations in all areas of the job. A 1 would be below
5 expectations and critical areas of the job need improvement,
6 and a 3 is solid -- minimum expectations of the job are being
7 met.

8 Q. Okay. So if Ms. Mecey had actually raised that score to a
9 4, that would be a -- that would actually be a more than
10 meeting minimum expectation?

11 THE COURT: Mr. Fox?

12 MR. FOX: Objection, Your Honor.

13 THE COURT: I'm sorry?

14 MR. FOX: Objection. It's redundant.

15 THE COURT: Yeah, it's cumulative. We're going to
16 sustain the objection.

17 BY MS. DURR:

18 Q. I mean, he read through the other scores?

19 THE COURT: It's redundant. Let's go.

20 BY MS. DURR:

21 Q. Okay. Now, are you aware if merit increases are standard
22 throughout the company for all employees?

23 A. Merit increases is part of the performance appraisal
24 process, but they're not standard. In other words, an employee
25 may not receive a merit increase based on performance if they

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1 did not perform well the previous year.

2 Q. Okay. Did you -- do you know if all of the direct reports
3 for Jill Mecey for the 2017 year, if they received a merit
4 increase?

5 A. For the 2017 year? I believe two of the employees would
6 not have received an increase in the 2017 year.

7 Q. Okay. I'm going to turn your attention to Plaintiff's
8 Exhibit 82.

9 THE COURT: I'm not positive that's in, so any
10 objection? Again, can't be objections, it plaintiff's, so it's
11 in.

12 (Plaintiff's Exhibit No. 82 was received in
13 evidence.)

14 BY MS. DURR:

15 Q. And I know it's a little bit small, but are you familiar
16 with this document, Ms. Salvo?

17 A. Yes. It looks like a summary of performance ratings given
18 to employees over a three-year period.

19 Q. Okay. Let's see here. Do you have -- have you ever seen
20 these types of charts before?

21 A. Yes. They are part of charts that we've compiled as part
22 of the merit increase and performance review summaries.

23 Q. Okay. And is this information actually that's part of
24 this litigation that was requested of you to provide?

25 A. I was asked to supply it, yes.

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1 Q. Okay. And the, and the information on here is true and
2 accurate to the best of your knowledge, right?

3 A. Yes, it is.

4 Q. Okay. So, for example, in 2015 for the two reports for
5 Ms. Mecey, it reflects that there were no increases for those
6 folks, right?

7 A. That's correct.

8 Q. And then in 2016, there was an increase for one employee
9 at 1.75 percent and another employee at 2.4 percent, but then
10 the third employee, Patty Schultz, got 0 percent merit
11 increase, correct?

12 A. That's correct.

13 Q. And then for the 2017 year, Zana Scott got a 3 percent
14 merit increase?

15 A. Um-hum, correct.

16 Q. And Donna Lapeyrouse and Mr. Rufo got no merit increases,
17 right?

18 A. Correct.

19 Q. Now, you talked about the policy of the company, that
20 there's no policy of retaliation, correct?

21 A. I'm sorry?

22 Q. Does the company have a no retaliation policy?

23 A. Yes, they do.

24 Q. Okay. Do you know where that statement is for Aclara?

25 A. Well, we have a no retaliation policy that's that; we have

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1 a Code of Business Conduct and Ethics; and there would be a
2 section there on no retaliation; and then we also have some
3 online training that employees are to take on business conduct
4 and ethics that also includes information on no retaliation.

5 Q. Okay. And I want to turn -- I want to turn your attention
6 to Defendant's Exhibit 290.

7 And I don't know that it's been admitted, so I move
8 to have it admitted.

9 THE COURT: Any objection to 290?

10 MR. FOX: Probably not. We haven't objected so far.
11 No objection, Your Honor.

12 THE COURT: All right. It's in.

13 (Defendant's Exhibit No. 290 was received in
14 evidence.)

15 MS. DURR: Defendant's Exhibit 290 -- why don't you
16 go to the first page first so she can identify it.

17 BY MS. DURR:

18 Q. Is this the Aclara Code of Business Conduct that you were
19 referencing?

20 A. Yes.

21 Q. Okay. And I want to turn your attention to the sixth
22 page.

23 And blow it up.

24 Is there a section that's headed -- with the header
25 "Retaliation Prohibited"?

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1 A. Yes, there is.

2 MS. DURR: Okay. And would you blow that up? Okay.

3 BY MS. DURR:

4 Q. And is that the no retaliation policy that you were
5 referencing?

6 A. That is one of the policies, but yes, that, that
7 particular verbiage is shown in all of the policies.

8 Q. Okay. To your knowledge, that is the statement of Aclara
9 prohibiting retaliation, correct?

10 A. Correct.

11 Q. And then for the entire time that you worked at -- that
12 Mr. Rufo worked at Aclara, did you have an understanding that
13 this policy was in place?

14 A. Yes.

15 Q. And did you have an understanding that you are not
16 supposed to retaliate against people who make complaints of --

17 A. No employee is to retaliate against anybody who makes a
18 complaint.

19 Q. Okay. And that you understand that if you were to have
20 been found to have retaliated against somebody in violation of
21 their policy, that you could suffer discipline?

22 A. Yes.

23 Q. Okay. And then, and then -- you said that you have
24 provided training to -- about, about discrimination or
25 retaliation?

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1 A. We have provided training for supervisors, core leadership
2 classes, that we went around and we met with supervisors and we
3 talked about what it takes to be a supervisor, the rules of
4 do's and don'ts in terms of working with employees, and there
5 was a section that also talked about retaliation and discipline
6 of employees.

7 Q. Well, I'm sorry, when you said supervisors, was this all
8 Aclara's supervisors, or could you provide some context to this
9 jury as to who you're talking about?

10 A. Yes. One of our legal counsel and myself had put together
11 a training program, and we went out to all of the SGS sites,
12 and we met with the program managers and the project managers
13 and the field supervisor to conduct this training.

14 Q. Okay. And when did you do this training?

15 A. We started developing the classes around July-August, and
16 we started doing the training, I want to say, in September --

17 Q. Okay.

18 A. -- October of the year.

19 THE COURT: I'm sorry, what year?

20 THE WITNESS: Oh, I'm sorry, 2017.

21 BY MS. DURR:

22 Q. And I want to turn your -- pull up Plaintiff's Exhibit 94.

23 I don't believe this has been admitted in. We'd move
24 to move its admission.

25 THE COURT: All right. It's in.

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1 (Plaintiff's Exhibit No. 94 was received in
2 evidence.)

3 BY MS. DURR:

4 Q. Is this the PowerPoint slide of the presentation that you
5 and -- who is the other person that presented?

6 A. Tim.

7 Q. Tim who?

8 A. I forgot his last name, I'm sorry. I'm nervous.

9 Q. Okay. Is this a slide of what -- is this a PowerPoint
10 presentation of your program?

11 A. Yes, it is.

12 Q. Okay. And I want to turn your attention to page 94-54.
13 Was the topics or items, the issues to consider that's shown on
14 Defendant's -- or Plaintiff's Exhibit 94-54, was that addressed
15 with the SGS supervisors?

16 A. Yes, it was.

17 Q. Okay. Okay. And then one last housekeeping matter:
18 The -- do you know which -- was there a progressive discipline
19 policy or some type of disciplinary policy that would apply to
20 office -- to an office coordinator position in Herndon?

21 A. It would be the corrective action guidelines.

22 Q. Okay. I'm going to turn your attention to Defendant's
23 Exhibit 302.

24 THE COURT: Any objection to 302?

25 MS. DURR: I think it was admitted already.

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1 THE COURT: All right.

2 MR. FOX: No, Your Honor.

3 THE COURT: All right. It's in.

4 BY MS. DURR:

5 Q. Sorry, Ms. Salvo, I know it's kind of small to read.

6 A. It's small.

7 Q. Okay. Is that the corrective action guidelines that you
8 were referencing?

9 A. Yes, it is.

10 MS. DURR: Okay. And if you could scroll a little
11 bit up, Susie, to "Practice," with the bullet points? Okay.
12 And the paragraph afterwards? Up a little bit, I'm sorry.

13 BY MS. DURR:

14 Q. Can you see it, Ms. Salvo, "Practice"?

15 A. I can. It's small, but yes.

16 Q. And to your knowledge, is that an accurate statement of
17 the discipline policy that would have been applicable to
18 Mr. Rufo?

19 A. Yes.

20 Q. Okay. Now, I want to turn your attention to Plaintiff's
21 Exhibit 87.

22 THE COURT: That's already in evidence.

23 BY MS. DURR:

24 Q. This is another progressive disciplinary policy, correct?

25 A. Correct.

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1 Q. Okay. Does this apply to an office coordinator position
2 in Herndon?

3 A. No. This was written specifically for the SGS installers'
4 employee handbook.

5 Q. Okay. And how much interaction did you have with Mr. Rufo
6 during the entire time that he worked for the company?

7 A. He didn't directly report to me, so off and on but not
8 much.

9 Q. Okay. Did you ever meet with Mr. Rufo face to face?

10 A. Yes. I met him at an operations meeting, an SGS
11 operations meeting that was conducted in St. Louis in June.

12 Q. Okay. Did he do anything at that meeting that raised any
13 concern with you?

14 A. There was a point in the presentations where Gina Petrella
15 and I were actually taking that employee handbook and reviewing
16 it with the project managers to kind of help them understand it
17 was a new process, it was a new way of doing things that they
18 hadn't been accustomed to at all, and we were presenting that,
19 and one of the project managers asked me a question, and before
20 I could answer it, Joey Rufo jumped in and answered the
21 question instead of me.

22 Q. Why was that a problem?

23 A. It was a problem because his role in that meeting and
24 because this was all new to the group, one, one problem was the
25 knowledge that, that he had about the process itself, and the

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1 second one was he was asked to come to that meeting so he could
2 sit and observe and understand, number one, SGS a little bit
3 better, but sit there and just observe, you know, the
4 interactions of the, of the group itself.

5 Q. Did you address that issue with Mr. Rufo?

6 A. I did not address it with him directly. I let his
7 supervisor know that that had happened.

8 Q. Who was his supervisor that you went to?

9 A. Jill Mecey.

10 Q. Okay. And did you direct or ask Ms. Mecey to do anything?

11 A. Typically when I observe something for somebody who's not
12 my direct report, I will talk to the supervisor. I will let
13 them know what's occurred, and then I ask them what they would
14 like to do. Sometimes it's they want me to talk to the person.
15 Other times, it's they want to handle it themselves.

16 And I usually go with what the supervisor recommends
17 or wants to do, and in that case, Jill Mecey said that she
18 would talk to him about it because she's the one who invited
19 him and set the expectation up for him.

20 Q. Okay. Now, did Mr. Rufo ever express to you that he was
21 interested in an HR position?

22 A. Yes, he did on two occasions.

23 Q. Oh, on two occasions. Tell us about the first occasion.

24 A. Right after the SGS operations meeting, during that
25 meeting, we had told the group that even though I was the

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1 business partner, we were thinking and looking at adding
2 another additional HR manager role that would report to me, and
3 that person would help me with the administration and just kind
4 of working through all of the other things that were going on
5 in SGS, because my job was increasingly growing bigger with SGS
6 on board.

7 So he had sent me an e-mail right after that asking
8 me that he had heard that come up in the meeting, and he was
9 interested in talking to me about putting his hat in the ring
10 to be considered for that position.

11 Q. Okay. I'm going to turn your attention to Plaintiff's
12 Exhibit 15. This is an e-mail from Mr. Rufo to you dated
13 June 16, 2017. The subject line is "This week." Is this the
14 e-mail you were just describing to the jury?

15 A. Yes, it is.

16 Q. Where he's asking you about, you know, this potential HR
17 position?

18 A. Yes.

19 Q. Okay. And then you said -- I'm sorry, after the e-mail,
20 did you actually have a conversation with him?

21 A. I did. I don't know exactly when, but I did follow up
22 because I wanted to respond to his request.

23 Q. What did you say?

24 A. I -- at that point in time, we were still working out the
25 details of the position, but I did tell him that I did not

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1 believe he had enough experience to do with his job what we
2 envisioned that job to be, that he didn't have the employee
3 relations experience we needed, he didn't have the operations
4 field experience that we needed as well to do that job in an
5 effective manner.

6 Q. Okay. And then you said there was a second time that he
7 brought it up -- or made you aware that he was interested in an
8 HR position?

9 A. Yes. This was about July, beginning of July, and he had
10 sent me another e-mail asking that I would reconsider his
11 interest in being put into that position, and he laid out what
12 he thought his qualifications were specific to taking on that
13 role.

14 Q. Okay. And turn your attention to Plaintiff's Exhibit 24.
15 The bottom portion, there's an e-mail from Mr. Rufo to you
16 dated July 6, 2017. Subject line is "For your consideration."

17 Is this the e-mail that you were just telling the
18 jury about?

19 A. Yes, it is.

20 Q. Okay. And did you have a follow-up -- any follow-up
21 communication with Mr. Rufo about his request that you consider
22 him?

23 A. On this particular e-mail, again, I know he had asked me
24 to reconsider, but I don't remember having an exact
25 conversation with him at that point. I let Jill know that he

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1 had, had asked me to put the request in to, to take the job.

2 Q. Okay. Did you consider him for that HR position?

3 A. No, I did not.

4 Q. And why not after you -- you reviewed his e-mail with,
5 with the bullet points he had about why he should be
6 interviewed, right?

7 A. Yes, I did.

8 Q. Okay. Did that change his mind at all?

9 A. No. What he listed here weren't enough skill sets of what
10 we were looking for specific to that position: again, somebody
11 that had a lot of operational field experience, knew the
12 population, and also somebody who had a lot of employee
13 relations experience that they could work with.

14 Q. Okay. I wanted to -- last question: I just want to go
15 back to your "Beautiful-Thanks" e-mail. You said that -- did
16 you ever get that e-mail forwarded to you by Jill Mecey?

17 A. Yes. Jill, Jill forwarded it to me.

18 MS. DURR: Okay. I want to put up Defendant's
19 Exhibit -- oh, wait. I think I need to enter it. We'd like to
20 use Defendant's Exhibit 281 and move for its admission.

21 THE COURT: Any objection?

22 MR. FOX: No, Your Honor.

23 THE COURT: It's already in, isn't it?

24 MR. ROLLINS: It's already in.

25 THE COURT: Is it already? Okay. That's what I

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1 wanted to make sure.

2 BY MS. DURR:

3 Q. Okay. Defendant's Exhibit 281, at the very top, the
4 subject line is "Violations and Determinations Tracking," and
5 at the bottom is the "Beautiful-Thanks" e-mail that you've
6 already testified about. And then on August 14, 2017, Jill
7 Mecey forwarded that e-mail with your response, correct?

8 A. Correct.

9 Q. Okay. And at the bottom of this long e-mail is the "Going
10 forward" e-mail, right?

11 A. Correct. Yes.

12 Q. Okay. Do you think you read that e-mail -- the "Going
13 forward" paragraph on August 14, 2017?

14 A. On August -- when she sent it to me?

15 Q. Yes.

16 A. That's when I read it, because she had indicated that he
17 had sent it to her because that's what he assumed my approval
18 was.

19 Q. Okay. Before August 14, 2017, had you ever read the
20 "Going forward" e-mail?

21 A. No.

22 MS. DURR: Okay. No further questions.

23 MR. FOX: I have some.

24 THE COURT: Yes, redirect.

25 REDIRECT EXAMINATION

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1 BY MR. FOX:

2 Q. You said EEO is not your area, yet you're training people
3 on retaliation for protected activity?

4 A. Yes.

5 Q. Okay. And Exhibit 94, which we just looked at, that's
6 your training people for protected activity, correct?

7 A. Yes.

8 MR. FOX: Let's put that up again. Let's put up the
9 first slide. Let's put up the progressive discipline slide.

10 MR. KATZ: Can you give me the number?

11 MR. FOX: 94-28.

12 BY MR. FOX:

13 Q. "Progressive Discipline + Due Process equals Just Cause."
14 You drafted that, correct?

15 A. Tim -- our legal counsel drafted these particular slides
16 related to progressive discipline and due process.

17 Q. And you presented this PowerPoint, did you not?

18 A. I presented it with him. He and I co-facilitated this.
19 He presented this particular slide.

20 Q. Was Joey Rufo given due process when he was put on a PIP?

21 MS. DURR: Object to the form. Object.

22 THE COURT: Overruled.

23 THE WITNESS: Oh, I'm sorry.

24 BY MR. FOX:

25 Q. Was Joey Rufo given due process when he was put on a PIP?

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1 A. Yes, he was.

2 Q. You said you hadn't even read his EEO analysis, Exhibit
3 34A, correct?

4 A. That's correct.

5 Q. Yet you put him on a PIP because he had done that
6 analysis?

7 A. I did not put him on a PIP because he had done an
8 analysis.

9 Q. Yeah, I heard that, too. You weren't involved in putting
10 him on a PIP; is that your testimony?

11 A. When you say I wasn't involved, I wasn't involved in
12 putting him on a PIP. Jill Mecey put him on the PIP.

13 Q. Well, let's look at the drafting history of the PIP, and
14 let's look at Exhibit 40.

15 THE COURT: Well, counsel, let's not wordsmith this,
16 all right? Come on.

17 BY MR. FOX:

18 Q. Okay. Let me ask this very quickly: You drafted the
19 draft of the PIP that's Exhibit 40, and you supplied it to Jill
20 Mecey, did you not?

21 A. Gina Petrella and I helped Jill put it together.

22 MR. FOX: Okay. Let's put up 40. And if we can go
23 to the first page?

24 BY MR. FOX:

25 Q. The first page indicates that you had sent this to Jill

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1 Mecey, correct?

2 A. Correct.

3 Q. And this is a draft of the PIP?

4 A. This is a draft of the -- this is one of the drafts of the
5 PIP, correct.

6 Q. Without going through the other exhibits, you're on all
7 the other PIP drafts, too, are you not?

8 A. Correct.

9 Q. Okay. And let's turn to Exhibit 94 that you drafted, and
10 let's look at page 94-32. "7 Questions to Discipline and
11 Discharge." First question: "Did your employee know the rule
12 and consequences?"

13 Do you see that?

14 A. Yes, I do.

15 Q. Do you know if Joey Rufo knew that he wasn't supposed to
16 report on disparities in, in treatment of persons who were
17 disciplined at the company based upon race?

18 A. I don't know what he knew regarding what his knowledge was
19 of reporting or not reporting it, but he did not have approval
20 to do so.

21 Q. Do you have any reason to believe he didn't report it in
22 good faith, his belief as to what was happening?

23 A. I can't answer that. I'm not --

24 MS. DURR: Objection. Calls for speculation.

25 THE WITNESS: I don't know what his intent or

Salvo - Redirect

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1 motivation was.

2 BY MR. FOX:

3 Q. Okay. Let's look at the fourth question you raised here:

4 "Did you conduct a fair investigation?" Do you see that?

5 A. Yes.

6 Q. Now, it's your testimony Jill Mecey did not report to you

7 that Joey had complained that he was put on a PIP because he

8 reported potential discrimination against African Americans?

9 A. I'm sorry, what was your question again?

10 Q. Let me repeat it: Is it your testimony that Jill Mecey

11 did not report to you that Joey had told her he was put on a

12 PIP because he had pointed out racial discrimination in the

13 disciplinary process?

14 A. Jill Mecey did not inform me of that.

15 Q. Okay. Had you been informed of that, wouldn't it have

16 been critical for the company to conduct a fair investigation?

17 MS. DURR: Objection. Calls for speculation.

18 THE COURT: No, if you know. I mean, the head of HR

19 should have a sense of that.

20 THE WITNESS: If that had been reported to me, it

21 would require an investigation.

22 BY MR. FOX:

23 Q. Skip ahead. Seventh one: "Does your penalty match the

24 offense?" How do you interpret that directive?

25 A. Exactly as it says: "Does your penalty match the

Salvo - Redirect

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1 offense?" He was put on a PIP, but he was not put on a PIP
2 purely for doing an analysis. There were other factors related
3 to his judgment that called out that PIP.

4 And it's a performance improvement plan, so it gives
5 him an opportunity to improve on the factors that have been
6 provided to him.

7 Q. Did the penalty match the offense?

8 A. The penalty of the performance improvement plan?

9 Q. Yes.

10 A. It's a performance improvement plan. Yes, it did.

11 Q. The next slide, "Issues to Consider." 94, page 54,
12 please.

13 A. Yes.

14 Q. "Issues to Consider," the first one is: "Disparate
15 Treatment Based on Protected Classes." That's Item No. 1,
16 correct?

17 A. Correct.

18 Q. Why is that an important issue to consider in any
19 investigation of discrimination?

20 A. I don't know enough about disparate treatment to be able
21 to give an answer that is credible enough for you.

22 Q. Well, you were conducting this seminar and presenting
23 these slides, were you not?

24 A. I was not conducting this slide. This was legal counsel
25 that was conducting this slide. I basically gave other sides

Salvo - Redirect

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1 that I presented based on human resources actions but not on
2 legal actions.

3 Q. The second item is: "Has the Company followed its own
4 policy?" Why is that important?

5 MS. DURR: Objection. Lack of foundation since the
6 witness has testified she didn't present on this slide.

7 THE COURT: Did you present anything on this slide?

8 THE WITNESS: On this slide, no. That was Tim's.

9 THE COURT: Then I'm going to sustain the objection.
10 Let's move on.

11 BY MR. FOX:

12 Q. Okay. Let's look at the next slide, 94-74.

13 THE COURT: Did you, did you prepare this slide?

14 THE WITNESS: No. That was Tim.

15 THE COURT: Did you present on this slide at all?

16 THE WITNESS: Did I present on this slide? No. I
17 might have clicked to that slide, but I did not present on that
18 slide.

19 THE COURT: All right. Then let's move on.

20 BY MR. FOX:

21 Q. Okay. I want to ask you a question about dropping the
22 ball, though, in the context of these matters that relate to
23 this case. Do you not acknowledge some responsibility for
24 dropping the ball in sending the e-mail to Joey that you sent
25 giving him a green light to do the analysis?

Salvo - Redirect

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1 MS. DURR: Objection.

2 THE WITNESS: I did not give him a green light to do
3 the analysis.

4 THE COURT: That's a fair question. Overruled.

5 THE WITNESS: I did not give him authorization or
6 agreement to do that analysis.

7 BY MR. FOX:

8 Q. You don't accept any responsibility for that, do you?

9 A. I accept responsibility when the responsibility is mine.

10 Q. You let that e-mail sit for a month before getting the
11 analysis, not responding further. Surely that's dropping the
12 ball, isn't it?

13 MS. DURR: Objection.

14 THE WITNESS: I didn't read the e-mail to know if I
15 had dropped a ball or not.

16 BY MR. FOX:

17 Q. What did you expect Joey to do after he received your
18 e-mail?

19 A. Are we talking about the "Good start. I'll look at it
20 later this weekend"?

21 Q. Yes, we are.

22 A. I would expect him to do the analysis that we asked him to
23 do, which was basically taking the information of the reports
24 and putting them on a spreadsheet.

25 Q. Wasn't the ball in your court when he wrote to you?

Salvo - Redirect

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1 A. The ball in my court was to basically take a look at what
2 he had sent me, and he asked me for an opinion on that
3 particular spreadsheet.

4 Q. Now, is it your testimony that when you called Joey and --
5 in the initial call after he released the EEO data and were
6 asking him a series of questions, is it your testimony you
7 weren't aware that he had produced the EEO matrix, which is
8 Exhibit -- which is Exhibit 34A?

9 A. Are you referring to the call that I had asked him the
10 questions about who authorized him to do the report?

11 Q. Yes.

12 A. At that point, I was aware he had done it, yes.

13 Q. But you haven't reviewed it, correct?

14 A. I did not review that report, correct.

15 Q. And had you reviewed that report, you would have seen that
16 he was noting in there that African Americans were greatly
17 overrepresented in discipline and that whites were greatly
18 underrepresented? Would you not have?

19 MS. DURR: Objection.

20 THE COURT: It's cumulative. We've had this so many
21 times.

22 MR. FOX: Last question, Your Honor.

23 THE COURT: All right.

24 THE WITNESS: Oh, I'm sorry. So --

25 THE COURT: There's no question. I'm sustaining the

Salvo - Recross

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1 objection.

2 THE WITNESS: Okay.

3 BY MR. FOX:

4 Q. What did you understand "greatly overrepresenting" and
5 "greatly underrepresenting" to mean?

6 MS. DURR: Lack of foundation. She already testified
7 she didn't review this spreadsheet.

8 THE COURT: Sustained.

9 BY MR. FOX:

10 Q. Do you understand -- do you have any knowledge of whether
11 or not there was, in fact, disparate treatment of African
12 Americans in the disciplinary process?

13 A. Okay. Do I understand that there was or there wasn't?

14 Q. Do you have any knowledge of whether there was or wasn't?

15 A. I have no knowledge whether there was or wasn't.

16 MR. FOX: I have no further questions.

17 THE COURT: Any recross?

18 RECROSS EXAMINATION

19 BY MS. DURR:

20 Q. Turning your attention back to Plaintiff's -- oh, excuse
21 me.

22 MR. FOX: Sure. Give me just a moment.

23 BY MS. DURR:

24 Q. Turning your attention back to Plaintiff's Exhibit 94, and
25 I have that up there, the core leadership skills, you testified

Salvo - Recross

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1 you gave that to the SGS supervisors, right?

2 A. Correct.

3 Q. Did you give this training to Ms. Mecey?

4 A. No. Ms. Mecey was not part of any of the training classes
5 that we conducted.

6 Q. And the supervisors that you were giving this training to,
7 who did they supervise?

8 A. Installers.

9 Q. Okay. And are those -- are any of those installers, do
10 you know if they're union workforce?

11 A. We did not conduct any of this training in the union
12 workforce sites.

13 Q. You did not, okay.

14 And then when -- you were involved in writing of the
15 PIP -- or giving the PIP to, to Mr. Rufo?

16 A. I didn't -- oh, sorry.

17 Q. I know you said that Ms. Mecey is the one who gave the
18 PIP, but you reviewed it.

19 A. Yes.

20 Q. Based on what you know, do you think that the PIP was
21 given to him fairly?

22 A. Yes, I do.

23 MS. DURR: Okay. No further questions.

24 THE COURT: All right. Since we're getting close to
25 the end, I'm assuming no one is going to call Ms. Salvo again

Salvo - Recross

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1 as a witness, correct?

2 MR. FOX: (Shaking head.)

3 MS. DURR: (Shaking head.)

4 THE COURT: All right. Ms. Salvo, you're excused as
5 a witness. You can stay in court and watch the proceeding or
6 leave, but you're not to discuss your testimony or anything you
7 see or hear in court with any witness who has yet testified.

8 THE WITNESS: Thank you.

9 (Witness excused.)

10 THE COURT: Your next witness?

11 MR. FOX: Sienna Church, Your Honor. She's been
12 sequestered, so we'll have to get her.

13 THE COURT: Well, she's outside, right?

14 MR. FOX: Yes. It will take a moment.

15 MS. DURR: Your Honor, before the witness comes in,
16 we have an issue that we'd like to discuss.

17 THE COURT: All right. Come on up.

18 (Bench conference on the record.)

19 THE COURT: Yes, Ms. Durr.

20 MS. DURR: Okay. Based on the questions that Mr. Fox
21 asked Ms. Mecey about whether she was aware that the father,
22 the father of Sienna Church was sick or ill or near death, we
23 would move to exclude any evidence or testimony about
24 Ms. Sienna Church's father being in poor health or near death.
25 We think that's highly -- that's irrelevant and highly

Church - Direct

673

1 prejudicial.

2 THE COURT: Are you planning to go into that? You
3 know, you can overdo it with a jury, too. We have a pretty
4 rational jury.

5 MR. FOX: I'm not going to overdo it. I'm just going
6 to ask her one question about it. She knew -- Jill Mecey knew
7 that, the situation that her father died. She terminated him
8 the very next day, after knowing that. It shows the kind of
9 people we're dealing with here.

10 THE COURT: No, I think I'm, I'm going to sustain the
11 objection.

12 MR. FOX: Your Honor, it goes to their -- it goes to
13 their emotional distress. They suffered.

14 THE COURT: I'm going to sustain the objection.
15 Thank you.

16 (End of bench conference.)

17 SIENNA CHURCH, PLAINTIFF'S WITNESS, AFFIRMED

18 DIRECT EXAMINATION

19 BY MR. FOX:

20 Q. Now, Sienna, could you state your name for the record,
21 please.

22 A. Sienna Church.

23 Q. What's your relationship to Joey Rufo?

24 A. He's my partner. We live together.

25 Q. How long have you been together?

Church - Direct

674

1 A. A little over four years.

2 Q. How did you meet?

3 A. We initially met on campus at Virginia Tech and then
4 started dating while he was doing some work for my mother's
5 company.

6 Q. Tell the jury what you do for a living, Sienna.

7 A. I'm an emergency veterinarian.

8 Q. How long have you been doing that?

9 A. Two-and-a-half years.

10 Q. Okay. And is an emergency vet a specialty?

11 A. It's not a specialty, but there is some postgraduate
12 training that goes into it.

13 Q. Is it stressful?

14 A. Incredibly stressful.

15 Q. Can you give us an example?

16 THE COURT: No. Counsel --

17 MS. DURR: Objection.

18 THE COURT: Counsel, this is way far beyond the scope
19 of what's involved in this case.

20 BY MR. FOX:

21 Q. Okay. Let's talk about Joey's job at Aclara. How did he
22 appear to react -- how did he appear to react when he got that
23 job?

24 A. He was very excited.

25 Q. Do you know if he enjoyed the people he worked with?

Church - Direct

675

1 A. He did.

2 Q. How was he when he would come home from Aclara typically?

3 A. He was typically -- in the beginning, he was typically
4 very excited, always had some new thing that he'd been
5 requested to do, felt like he was getting a lot of
6 responsibility.

7 Q. Did things change at some point?

8 A. Drastically.

9 Q. How did they change?

10 A. You know, he would kind of wake up in the morning and
11 absolutely dread going into work, and he would come home and
12 just be mentally, physically, emotionally exhausted.

13 Q. Was he worried that he might lose his job?

14 MS. DURR: Objection. Leading.

15 THE COURT: Sustained. You can't lead this witness.

16 BY MR. FOX:

17 Q. How was his emotional state at that point?

18 MS. DURR: Objection.

19 THE COURT: No.

20 MS. DURR: Speculation.

21 THE COURT: No, a person can testify to that.

22 Overruled.

23 THE WITNESS: In the beginning, he was very stressed
24 and anxious.

25 BY MR. FOX:

Church - Direct

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1 Q. Do you recall what his reaction was when he was placed on,
2 on the PIP?

3 A. He was, he was very, very upset. He came home that night,
4 and we had plans to go to dinner. We went to dinner, and he
5 really didn't eat much, really couldn't focus on talking with
6 me about anything. When we came home, he kind of just said,
7 "I'm tired," and went to bed. Things really just kind of
8 spiraled from there.

9 Q. You say it spiraled from there. Can you describe that?

10 A. He really started to kind of withdraw from me. I work
11 overnights, and so we really only get to see each other first
12 thing in the morning or right before I go to work, and that was
13 either when he was kind of dreading thinking about the day
14 ahead or just mentally and emotionally exhausted when he came
15 home. So we didn't have a lot of communication.

16 His sleep became incredibly restless, and he started
17 sleeping on the couch a lot. He, you know, didn't really want
18 to spend a whole lot of time with me and really withdrew.

19 Q. Okay. Describe to me how, how he reacted and how it
20 affected your relationship when he was fired.

21 A. The day he was fired was a very difficult day. My father
22 had --

23 MS. DURR: Objection.

24 THE COURT: I've sustained the objection, so we need
25 to move on from that.

Church - Direct

677

1 BY MR. FOX:

2 Q. Okay. Why was it difficult?

3 THE COURT: Wait. Counsel, don't try to elicit
4 something I said was not coming in.

5 BY MR. FOX:

6 Q. Okay. Just describe for a minute, if you can, how Joey
7 reacted to being fired.

8 A. He called me about nine or ten o'clock in the morning, and
9 I could tell the second I picked the phone up something was
10 very wrong. I asked what was wrong, and he said he had been
11 fired, and it was devastating for both of us but particularly
12 him.

13 Q. And what did you observe about him that makes you say it
14 was devastating for you?

15 A. He became very depressed. He, you know, had a lot of
16 self-doubt, really lost his self-confidence.

17 MS. DURR: Objection. Lack of foundation.

18 THE COURT: No. I think somebody who lives with
19 someone for several years can testify as to whether someone has
20 lost their self-confidence. Overruled.

21 THE WITNESS: He really, you know, started to worry a
22 lot about his future and our future and what we would be able
23 to do.

24 BY MR. FOX:

25 Q. Okay. His, his -- I know it was a tough time for you, but

Church - Cross

678

1 has Joey recovered emotionally from all this?

2 A. He hasn't. He's, he's not the same as he was before.

3 He's still really anxious about the future. He's still, you
4 know, just -- the spark isn't, isn't as bright as it used to
5 be.

6 MR. FOX: Thank you, Sienna.

7 THE COURT: Any cross-examination?

8 CROSS-EXAMINATION

9 BY MS. DURR:

10 Q. I want to make it clear, Ms. Church, you've never worked
11 at Aclara, have you?

12 A. No.

13 Q. Okay. And you don't know Jill Mecey?

14 A. No.

15 Q. You don't know Lyn Salvo?

16 A. No.

17 Q. You don't know Gina Petrella?

18 A. No.

19 Q. You don't know Michael Garcia?

20 A. No.

21 Q. Okay. And you have no personal knowledge to share with
22 the jury about whether these managers believed Mr. Rufo was
23 reporting intentional discrimination, do you?

24 A. I don't know what they were thinking.

25 Q. Okay. Good. And so you have no personal knowledge to

Church - Cross

679

1 dispute any testimony that may have been presented by any of
2 those witnesses, correct?

3 MR. FOX: I'm going to object. She wasn't --

4 THE COURT: Sustained.

5 BY MS. DURR:

6 Q. You wouldn't have any personal knowledge to object to --
7 to dispute any facts about the reasons for giving Mr. Rufo a
8 written warning and PIP, do you?

9 A. Again, I don't know what they would be thinking.

10 Q. Okay. And you have no personal knowledge to dispute any
11 of the testimony that Ms. Mecey, Ms. Salvo, Ms. Petrella, or
12 Mr. Garcia provided as to the reasons for the position
13 elimination, right?

14 A. I did not hear that testimony. I don't know. I have
15 actually overheard conversations between Joey and Ms. Mecey.

16 Q. Have you ever heard her speaking?

17 A. Yes.

18 Q. Okay. And are you talking about, about the position
19 elimination?

20 A. There were multiple phone conversations I've overheard.

21 Q. About the position elimination?

22 A. I don't think the position elimination specifically, no.

23 Q. Okay. And what phone conversations are you talking about
24 then that you overheard? Are you talking about phone
25 conversations that Mr. Rufo recorded?

Church - Cross

680

1 A. No. No. Phone conversations that he had while I was next
2 to him.

3 Q. Okay. And in any of those conversations, did Ms. Mecey go
4 and tell him that she was retaliating against him for, for
5 something that she didn't like?

6 A. She did talk about him, he should quit.

7 Q. When was this?

8 A. I believe it was December or November.

9 Q. Really? And you heard -- and in what context?

10 A. Let's see, I had gone to meet him after work and was
11 waiting for him to finish some stuff up, and she had called
12 about a performance evaluation, to go over with him how he had
13 changed, what he had improved, what he hadn't improved.

14 That was the conversation where she told him he would
15 not be getting his merit increase and that maybe he would come
16 off the PIP in the future and that, you know, if he -- he had
17 done a good job, so it was okay, but he still needed to
18 improve, and if that wasn't something he wanted to do, then
19 maybe he should consider quitting.

20 Q. Were you at the office?

21 A. Yes.

22 Q. Oh, you were at the office when Ms. Mecey was having a
23 conversation with Mr., with Mr. Rufo?

24 A. Yes.

25 Q. And did you identify that you were on the call?

Church - Cross

681

1 A. No. It wasn't like it was on speaker phone.

2 Q. Oh, okay. Well, then how --

3 A. It was very easy to overhear.

4 Q. How come?

5 A. She was very loud.

6 Q. So you want the jury to believe that, that Ms. Mecey was
7 speaking very loudly but not on speaker phone, and you actually
8 heard her say that he should quit?

9 A. Yeah.

10 Q. Okay.

11 A. I was sitting right next to him.

12 Q. Would it surprise you that there's been no testimony so
13 far in this trial about this? Your boyfriend didn't say
14 anything.

15 THE COURT: That's not a proper question.

16 MS. DURR: Okay.

17 THE COURT: We don't have prior testimony run by
18 witnesses. We have them sequestered for a reason. Let's move
19 this along.

20 BY MS. DURR:

21 Q. And did, did Ms. -- this was in November or December, you
22 said?

23 A. Yes.

24 Q. Okay. And this was at the time -- do you know that -- did
25 you know that Ms. Mecey actually removed Mr. Rufo from the

Church - Cross

682

1 performance improvement plan in December of 2017?

2 A. All I know is on the call, there was mention of the
3 possibility.

4 Q. Of a possibility of the PIP, PIP being removed.

5 But you have no evidence whether it was, in fact,
6 removed?

7 A. No. There were --

8 Q. And you have no evidence to dispute Ms. Mecey -- evidence
9 that Ms. Mecey did remove him from the PIP?

10 A. I don't have access to her files, so no.

11 Q. Okay. And Ms. Mecey did not fire him at that time, right?

12 A. Not at that time.

13 Q. In that call that you overheard?

14 And you said that -- after Mr. Rufo -- you said that
15 after he got the PIP, that he started spiraling, right? I
16 think that was your testimony?

17 A. His emotional state.

18 Q. His emotional state was spiraling. Yet he was still
19 working at Aclara, wasn't he, at that time that he was on the
20 PIP?

21 A. Yes. We couldn't afford for him not to have a job.

22 Q. Yeah. I mean, Aclara didn't fire him, right?

23 A. Um-hum.

24 Q. That's right? Aclara didn't fire him?

25 A. No.

Church - Cross

683

1 Q. Aclara didn't dock his pay, cut his -- slash his salary,
2 do anything, right?

3 A. They did not do any of those things.

4 Q. Okay.

5 A. They did look at him with a pretty dang fine-toothed comb.
6 His work life was --

7 Q. Well, you don't have any personal knowledge of that?

8 MR. FOX: Your Honor, if the witness could complete
9 her answer, I'd appreciate it.

10 MS. DURR: I apologize if I'm not. I just --

11 THE WITNESS: I mean, watching the person you love
12 wake up every day absolutely dreading whether or not the
13 kitchen was going to be clean enough and feeling the need to
14 take pictures of it, feeling the need to justify every second
15 he was away from his desk and make sure that there was
16 absolutely no reason that they could fire him since he was
17 blatantly told he was on a final written warning and one wrong
18 move and that was it.

19 BY MS. DURR:

20 Q. Is this all knowledge that you obtained just from
21 Mr. Rufo?

22 A. Yeah.

23 Q. Okay. So you don't know Aclara's side of the story at
24 all, do you?

25 A. I mean, I've seen the PIP.

Church - Cross

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1 Q. Okay. Other than that, you don't know Aclara's side of
2 the story, do you?

3 A. I can't say that I've been with them.

4 Q. Okay. Again, the answer is you don't know Aclara's
5 side of the story?

6 THE COURT: That's been asked and answered. Let's
7 move on.

8 BY MS. DURR:

9 Q. Okay. So since Mr. Rufo's position was eliminated, you've
10 been supporting your boyfriend financially, haven't you?

11 A. To some degree.

12 Q. Has he been doing other work?

13 A. Very recently.

14 Q. Okay. So is it your opinion that Mr. Rufo was not
15 carrying his weight in your relationship financially before he
16 found a job?

17 A. That was not my opinion.

18 Q. Okay. Is it your opinion that Mr. Rufo was completely
19 leaning on you after his position was -- after he was no longer
20 working at Aclara?

21 A. I find that very offensive, I'm sorry. My opinion is that
22 I love him and that we are together and that we're going to do
23 whatever it means to be together. There is no he/she, you/me,
24 my finances/your finances. We're together, and there's no
25 blame because that's inappropriate in a relationship.

Church - Cross

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1 Q. So you two are a team?

2 A. Yes.

3 MS. DURR: Okay. And -- no further questions.

4 THE COURT: Any redirect, Mr. Fox?

5 MR. FOX: No redirect, Your Honor.

6 THE COURT: All right. Thank you, Ms. Church. You
7 may step down, and you can stay in court because I believe
8 you're the last witness for, at least for the plaintiff.

9 (Witness excused.)

10 THE COURT: Are there going to be any witnesses for
11 the defense?

12 MS. DURR: May we have ten minutes? Because --

13 THE COURT: All right. Ladies and gentlemen, let me
14 give you-all a break at this point.

15 But no one is going to call Ms. Church again,
16 correct?

17 MS. DURR: No.

18 THE COURT: All right. So she can stay in court.

19 All right. Let me tell the jury, I'm going to give
20 you a ten-minute break. We're getting close to the end of the
21 trial. This break might get extended slightly, but let me
22 start with ten minutes, and we'll see if we have any more
23 evidence. All right, folks? All right.

24 All right. The jury can leave, all right?

25 (Jury out.)

1 THE COURT: All right. Is the plaintiff resting at
2 this point?

3 MR. FOX: Your Honor, we're going to call Mr. Rufo
4 for some brief rebuttal.

5 THE COURT: But you've rested your case-in-chief. It
6 doesn't go that way. You don't get to call one witness twice
7 in the same case.

8 MR. FOX: Oh, correct, Your Honor. We're resting our
9 case-in-chief.

10 THE COURT: All right, all right. Now, Ms. Durr,
11 what do you need the break for? I mean, I'm giving you ten
12 minutes, but what are you doing?

13 MS. DURR: We're going to -- just to assess whether
14 we're going to call another witness.

15 THE COURT: And that witness has not been in the
16 courtroom?

17 MS. DURR: No.

18 THE COURT: All right. So he or she is outside?

19 MR. FLOOD: If I may --

20 THE COURT: I'm sorry?

21 MR. FLOOD: May I clarify? We need to confer on
22 actually whether we're going to put Ms. Mecey on the stand in
23 response to that testimony.

24 THE COURT: Oh, all right. All right. All right,
25 we'll do it -- we'll recess court.

1 MR. FLOOD: Thank you, Your Honor.

2 (Recess from 3:35 p.m., until 3:50 p.m.)

3 (Jury out.)

4 THE COURT: All right. Ms. Durr, what's the defense
5 going to do?

6 MR. ROLLINS: Your Honor, we'd like to make a motion
7 for judgment as a matter of law.

8 THE COURT: All right. You've made it, I deny it,
9 let's go.

10 MR. ROLLINS: Yes, Your Honor.

11 THE COURT: All right. Are you putting on any
12 evidence?

13 MS. DURR: Yes, Your Honor. Defendants called Jill
14 Mecey.

15 THE COURT: All right. Wait a minute. We have to
16 get the jury in then. All right. Let's get the jury in.

17 Well, while we're waiting for the jury, have you had
18 a chance to look at the proposed verdict form?

19 (Jury present.)

20 THE COURT: All right. Everybody's here? You-all
21 may have a seat.

22 All right. My understanding is the defense is going
23 to put on Ms. Mecey again?

24 MS. DURR: Yes, Your Honor.

25 THE COURT: All right. Ms. Mecey, you're still under

Mecey - Direct

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1 your affirmation to tell the truth.

2 THE WITNESS: Yes, Your Honor.

3 JILL MECEY, DEFENDANT'S WITNESS, PREVIOUSLY AFFIRMED, RECALLED

4 DIRECT EXAMINATION

5 BY MS. DURR:

6 Q. Ms. Mecey, you heard Ms. Church's testimony where she
7 claims that she heard you in November or December of 2017 tell
8 Mr. Rufo that you were thinking about taking him off the plan,
9 performance improvement plan, but that maybe he should think
10 about quitting. Did you hear that testimony?

11 A. I did.

12 Q. Okay. What's your reaction to that?

13 A. Shock.

14 Q. And did you or did you not say that?

15 A. I did not.

16 MS. DURR: No further questions.

17 THE COURT: Any cross-examination?

18 MR. HOROWITZ: None, Your Honor.

19 THE COURT: All right. Thank you, Ms. Mecey. You
20 may step down.

21 (Witness excused.)

22 THE COURT: All right. Is there any further
23 evidence, Ms. Durr, or whoever is lead counsel for defense?
24 Any further evidence for the defense?

25 MS. DUFF: No, Your Honor.

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1 THE COURT: All right. Is there any further evidence
2 from the plaintiff?

3 MR. HOROWITZ: Yes, Your Honor. We would just like
4 to put Mr. Rufo on for a briefly rebuttal.

5 THE COURT: All right. Mr. Rufo, you're still under
6 affirmation. Go up to the lectern -- up to the stand, rather.
7 JOSEPH RUFO, PLAINTIFF'S WITNESS, PREVIOUSLY AFFIRMED, RECALLED

8 DIRECT EXAMINATION

9 BY MR. HOROWITZ:

10 Q. Mr. Rufo, at the time you submitted your analysis in
11 August of 2017, how many SGS installers did Aclara employ?

12 A. Are you asking me about the SGS employees which I was
13 tracking the discipline for and the terminations or just the
14 installers?

15 Q. Yes, I'm sorry, the employees of SGS you were tracking
16 discipline for.

17 A. I know that they had 540 employees that self-identified
18 racially.

19 Q. And how did you know that?

20 A. Because the way the analysis was done was in Paycom,
21 there's a suite of tools that are used for queries, and the
22 qualifiers for those numbers were that they fell within the SGS
23 division and that they were an active employee.

24 MR. FLOOD: Your Honor, I need to object. This is
25 beyond the scope of rebuttal to Ms. Mecey's testimony. This

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1 testimony should not be permitted. It's not proper.

2 THE COURT: I sustain the objection. Rebuttal is to
3 rebut the defense case, and the only witness the defense put on
4 was that one small witness.

5 MR. HOROWITZ: Your Honor, the defense put on all
6 their evidence in our case.

7 THE COURT: I've ruled.

8 MR. HOROWITZ: I understand. Okay. Then nothing
9 further, Your Honor.

10 THE COURT: All right. Thank you, Mr. Rufo. You may
11 step down.

12 (Witness excused.)

13 THE COURT: And now, ladies and gentlemen, once
14 again, we have completed all of the evidence, but there are
15 some logistical matters I have to take care of, so you're going
16 to get to go back to the jury room, and we'll get you back in
17 here as quickly as possible. The next thing you're going to
18 have are the closing arguments of counsel and then my
19 instructions.

20 And I am going to want you folks to just move a
21 little bit more to the center because I really do want to make
22 eye contact with you while I'm reading the instructions, okay?
23 But we'll get this case to you as quickly as we can.

24 I've told the attorneys they each have up to a half
25 an hour for their closing arguments to you, so that's another

1 hour. It's probably going to take me 20 to 30 minutes to give
2 you the instructions. So we're going to wrap the evidence and
3 the instructions up today. Most likely, you won't start much
4 deliberating today, so that you're heads up on that. But
5 anyway, we'll get to you as quickly as possible. So if you
6 don't mind leaving at this point, we'll stay in session.

7 (Jury out.)

8 THE COURT: All right. Counsel, you know, we
9 e-mailed to you fairly late last night -- well, it was before
10 8:30; that's not all that late -- the Court's proposed charge.
11 I recognize that you-all had done a really good job on agreeing
12 to most of the instructions.

13 We did send you this morning some edits, and then
14 since then, there were two more that I further edited. I think
15 most of those edits were aesthetic. For example, in one case,
16 you used the word "worker." I thought "employee" was a better
17 word since it's an employer and employee is how we've talked
18 about things.

19 I hope you've looked at the instructions because I
20 was not expecting a long charging conference given the fact
21 that you-all did spend a lot of time working on them. I've
22 looked at the objections that you've filed as to each other's
23 mostly, in my view, linguistic or stylistic things.

24 The only substantive instruction that I recall not
25 giving at all was the plaintiff's instruction as to taxes,

1 which I've never given that instruction. It's not required in
2 the Fourth Circuit, and I don't intend to give that one, but
3 other than that, I want to know if there are any objections to
4 the charge as the Court proposes to give it to you.

5 Yeah.

6 MR. HOROWITZ: None from the plaintiff, Your Honor.

7 THE COURT: All right. How about from the defense?

8 MR. ROLLINS: None other than the ones previously
9 submitted to the Court, Your Honor.

10 THE COURT: In other words, you're going to -- for
11 the purpose of the record, you want to hold on to the
12 objections you've noted in the submissions, the first set.

13 MR. ROLLINS: Yes, Your Honor.

14 THE COURT: All right. But, you know, this is your
15 chance. I mean, if there's a material issue that you think is
16 legally wrong in the instructions the Court is giving, you're
17 supposed to argue that to me now. Just saying, well, we filed
18 it a while ago, I mean, I'm open to hearing if there's anything
19 you think is from a legal standpoint insufficient or
20 inaccurate, you've got to make the record now. Otherwise, it's
21 invited error.

22 MR. ROLLINS: Your Honor, if I may make one point?

23 THE COURT: Yes. Which instruction?

24 MR. ROLLINS: The malice or reckless indifference
25 charge.

1 THE COURT: Right.

2 MR. ROLLINS: Your Honor, if I could draw your
3 attention to the fourth and final paragraph?

4 THE COURT: Okay.

5 MR. ROLLINS: In the defendant's proposed version,
6 there was additional language to flesh out what the cases say
7 constitutes a good faith attempt to comply with the law, that
8 being implementing policies, procedures, training, things of
9 that nature, in a good faith attempt to maintain compliance
10 with antidiscrimination, anti-retaliation laws, and it is
11 defendant's position that the Court's instruction, by omitting
12 that portion, deprives the jury of necessary context from which
13 they could draw the appropriate conclusion based on the
14 evidence.

15 THE COURT: All right. Does the plaintiff want to
16 respond to that?

17 MR. HOROWITZ: Your Honor, certainly we -- there is a
18 good faith defense that exists. We disagree, of course, with
19 how Aclara construes it. Aclara believes that just essentially
20 having personnel policies means that you've made a good faith
21 attempt to comply with the law, and we believe that in order to
22 make a good faith attempt to comply with the law, you must
23 implement and follow those policies in good faith.

24 So thank you.

25 THE COURT: Well, hold on a second. Maybe I misread

1 what you-all submitted, so hold on. I'm looking at Proposed
2 Instruction 19, and it says: "Punitive damages agreed." I did
3 take out a portion of that, as I recall, because we're not
4 talking -- I wasn't even going to mention the word "punitive
5 damages" to the jury.

6 So did you-all look carefully at 19 -- I'm sorry, 26?
7 It's 26 in our instructions. It was 19 in the one you-all
8 submitted.

9 MR. HOROWITZ: It's 18, I believe, in the joint
10 proposed.

11 THE COURT: I'm sorry, 18, 18. Yeah, okay.

12 MR. HOROWITZ: Your Honor, the other issue with this
13 was --

14 THE COURT: Hold on a second.

15 MR. HOROWITZ: I'm sorry.

16 THE COURT: We do have the good faith attempt to
17 comply with the law.

18 MR. ROLLINS: Yes, Your Honor.

19 THE COURT: It's there.

20 MR. ROLLINS: Oh, I'm not arguing that it's not there
21 at all. My only -- our only argument would be on the language
22 specifically that was removed that would provide context for
23 what that really means.

24 THE COURT: Well, both sides have wanted me to add
25 context to some degree which is arguing your positions. I've

1 cut some of the plaintiff's efforts to put context in, too.

2 No, in relooking at this, I'm satisfied this gives
3 you what the law requires, that you can make the good faith
4 argument and it's there. So I understand -- is that the only
5 issue the defense has materially?

6 MR. ROLLINS: Yes, Your Honor.

7 THE COURT: All right. All right. So I'm leaving
8 the instruction as we've proposed it.

9 Now, take a look at the verdict form. I changed that
10 statement on page 2 that their job is done because it may or
11 may not be done. It depends on how they answer Question No. 3,
12 but I did reduce in No. 2 -- I think this was the defense
13 request, and I think it's correct -- that the way in which
14 compensatory damages are presented to the jury, that's
15 sufficient in my view. Pain and suffering, inconvenience,
16 mental anguish, and loss of enjoyment of life. All right?

17 So if there are no objections, we're ready to start
18 the -- oh, the last thing we need to do, and I think we can do
19 this after we finish with the jury because I really want to get
20 this case to them tonight and I'm sure you-all do as well --
21 what I normally do is to make sure that all the exhibits have
22 been entered into evidence is I will have each side once we get
23 the case to the jury, going through your respective lists of
24 what -- actually, what I have my courtroom deputy do is read
25 her notes as to what exhibits she has formally as entered into

1 evidence, and then if either side believes that there's an
2 exhibit that you thought you'd moved in that's not reflected as
3 being in, you can correct that, and if there's an exhibit
4 that's in evidence that either side thinks should not be in
5 evidence, this will be your time to correct that.

6 Given the late hour of the day, the evidence is most
7 likely not going to get to the jury tonight.

8 Now, the only two audiovisual exhibits, I believe,
9 that are actually exhibits are the two -- they're not visual;
10 they're just audio -- are the two tape-recorded conversations
11 between Mr. Rufo and defense folks, correct?

12 MR. HOROWITZ: Yes, Your Honor.

13 THE COURT: All right. What format is that on? Is
14 it on a disc, CD? What is it on?

15 MR. HOROWITZ: Your Honor, they're digital
16 recordings, and we can put them on a disc if that's preferable.

17 THE COURT: All right. When we leave, you need to
18 make sure you've checked with my courtroom deputy as to how
19 that -- what format they should be in so the jury, if they want
20 to replay them, can do so in the jury room. We have a clean
21 laptop from the court that we usually use to do playback, but
22 if you don't have them in that format, then we have a problem.
23 All right?

24 MR. HOROWITZ: We can do that, Your Honor. Thank
25 you.

1 THE COURT: Okay. And then did you -- overnight, did
2 you put together your proposed indexes of exhibits? I mean, I
3 know some went in today as well, so it might not have been
4 completed.

5 MR. HOROWITZ: We did. I don't -- I'm not aware that
6 either side has any objections to the other party's, but they
7 will require some revisions based on today.

8 THE COURT: All right. That's fine.

9 MR. ROLLINS: That's correct, Your Honor, and they
10 have been exchanged.

11 THE COURT: All right. Good. Are there any other
12 housekeeping matters then before -- oh, how does the plaintiff
13 want to divide up time for your argument? Each side has a
14 total of 30 based on our conversation yesterday.

15 MR. FOX: Your Honor, I'll probably go 20-24 minutes,
16 let's say, and 6 minutes for rebuttal.

17 THE COURT: All right. My law clerk, Mr. Getz, is
18 going to keep track of the time. So he'll try to give you a
19 two-minute warning, just like in moot court, all right? So you
20 need to check it out with him. I am going to try to hold you
21 strictly to the time limit so we can get this case to the jury
22 tonight.

23 MR. FLOOD: I have one more minor issue, Your Honor.

24 THE COURT: Yeah. At the lectern.

25 MR. FLOOD: Thank you. I have, it's basically some

1 PowerPoint slides to show during parts of my argument, and it's
2 basically points I'm arguing to the jury.

3 THE COURT: Yeah.

4 MR. FLOOD: I alerted Mr. Fox to that. I've not
5 given him a copy because it's, you know, my argument. I'll do
6 whatever the Court thinks is appropriate on that. I have a
7 copy for the Court if you'd like.

8 THE COURT: Well --

9 MR. FLOOD: I don't think anything I'll put up is
10 controversial or is not --

11 THE COURT: That's the danger you run. I mean, you
12 know, I hate to see an objection drawn during closing argument,
13 but if it's beyond the scope of what the evidence was in the
14 case, you do run that risk.

15 MR. FLOOD: I understand.

16 THE COURT: So having put you on notice of that,
17 we'll go ahead.

18 Hold on one second, I'm sorry.

19 So that's the problem with if you're going to use
20 PowerPoint, all right?

21 MR. HOROWITZ: Yes, Your Honor. We will also accept
22 the admonition that you just gave to Mr. Flood in that regard.

23 THE COURT: All right. So in other words, both sides
24 proceed at their own risk.

25 MR. FLOOD: I have no problem, I mean --

1 THE COURT: All right.

2 MR. FLOOD: -- if it helps to give them a copy, I'll
3 do it.

4 I'm not sure it helps because they still may object,
5 so I understand that dynamic, you know.

6 THE COURT: Let them being surprised.

7 (Laughter.)

8 THE COURT: However, I don't like being surprised, so
9 if you'll hand it up to my folks?

10 MR. HOROWITZ: Your Honor?

11 THE COURT: Yes, sir.

12 MR. HOROWITZ: Unfortunately, I don't believe that we
13 have a copy of ours. It's all digital.

14 THE COURT: All right. It is what it is.

15 MR. HOROWITZ: All right. I apologize.

16 THE COURT: All right. So we're set for the jury?
17 All right. Let's bring the jury in.

18 THE COURT SECURITY OFFICER: Yes, ma'am.

19 THE COURT: Mr. Fox, are you making both
20 statements -- both arguments for the plaintiffs?

21 MR. FOX: I'm sorry, I didn't quite hear you.

22 THE COURT: Are you doing both arguments for the
23 plaintiffs?

24 MR. FOX: Yes.

25 THE COURT: Okay.

1 (Jury present.)

2 THE COURT: All right. Now, this is, this is going
3 to be closing argument, so if you still want to sit down at
4 this end so you can see the attorneys as they stand at the
5 lectern, that's fine, but when I go to instruct, I'm going to
6 want to be able to see all of your faces, all right?

7 All right, counsel.

8 You can all have a seat.

9 CLOSING ARGUMENT

10 BY MR. FOX:

11 Thank you, Your Honor.

12 This is a case about a company that clearly doesn't
13 care about potential intentional discrimination, even when it's
14 put right in front of them, right in front of their face. It's
15 done nothing to investigate the information it was provided.

16 The only thing they've done is punish the person who
17 brought it to them. They blamed him and avoid taking any
18 responsibility for their behavior: not reading e-mails, not
19 being familiar with EEO laws, and clearly not being familiar
20 with the laws of this land in their own internal policies,
21 which do require them to investigate discrimination claims and
22 require them not to punish the person who has brought it to
23 them.

24 It doesn't matter that they now act as if they didn't
25 want to get that information. They got it. It was right in

1 front of them. Joey Rufo didn't have to say over and over
2 again: This is discrimination. And he did tell them. The
3 spreadsheet says it all.

4 He had a right to assume that they would read his
5 e-mails and look at the data, and some of them did. The
6 spreadsheet says it all. He had a right to assume that they
7 would read the e-mails and look at the data, the highest people
8 in the HR department.

9 It was obvious. They only had to read the first
10 e-mail, which explained what was going to be put together and
11 how he was asking their permission. They only had to open this
12 attachment that was with the second e-mail at the end of
13 July -- the end of August, rather. They only had a whole month
14 to look at -- they had a whole month to look at the e-mail with
15 the description of what he was proposing to do.

16 They never looked at it. You heard Lyn Salvo today,
17 senior director of HR, say she didn't read the e-mail. She
18 said, "Great start." And she testified today that she expected
19 him to move forward. That's what she said if you listened
20 carefully to her testimony.

21 They also failed to inform anyone but their inner
22 circle about what was in there, including leaving other
23 managers who would have a right to know, like Alvin Jackson,
24 the head of the SGS group, and while it may be coincidence, he
25 happens to be an African American, he said in his testimony

1 that if he had known that there was data on discrimination,
2 he'd want to investigate it further.

3 He wasn't given that chance because it was buried
4 with the inner circle of executives in HR, and they worked hard
5 to keep it that way, to keep Joey without resources or anyone
6 to talk to.

7 The company has used ignorance of the law and
8 incompetence to defend itself in this matter: It was too long
9 to read. We didn't see it. We didn't know what it was.

10 And the best one was Ms. Jill Mecey: I don't know
11 what "EEO" is. I'm not a numbers person.

12 And when they did that, they just broke the law.

13 She also finally admitted this morning that she
14 suddenly learned what "EEO" means. That was telling.

15 The judge will instruct you on the law, but what she
16 will tell you is this: This case is not about whether there
17 was actual discrimination happening. We think there was, but
18 let me say that again: He doesn't have to prove that it was
19 actual discrimination. All Joey has to prove is that he had a
20 reasonable good faith belief that it was happening, and if
21 there's some uncertainty as to whether the managers in the
22 field were, in fact, targeting African Americans and
23 multiracial people or were influenced by their biases for
24 whatever reason and how they treated them, that's not the issue
25 and that's not what you're here to decide, so don't let them

1 confuse you about that.

2 What's also important here is the law protects the
3 employee. That's the basic purpose for the retaliation laws
4 because it's important for employees in every company,
5 employees like Joey, to be able to bring lawsuits to oppose
6 unlawful discrimination and to be free from retaliation when
7 they do that. The law protects the employee. Remember that.

8 Once the company had discrimination data in front of
9 it, the laws in the United States were invoked. They had the
10 right to recognize this data for what it was: disparate
11 treatment of their employees based on race, labeled right in
12 the chart for all to see. And they had the right -- they had
13 to protect his right to see something. If you see something,
14 then say something, as Alvin Jackson said.

15 And when Joey sued them, believing he was being
16 retaliated against, not seeming to take any action to follow
17 up, they had another legal responsibility that kicked in: not
18 to do anything to retaliate against him because he was suing
19 them for retaliation.

20 They wanted to maintain a veil of secrecy. Their
21 case rests on the idea that Joey went above and beyond his job
22 duties and didn't recognize the hierarchies in the
23 organization. Remember, this is a guy who's in the military.
24 His whole demeanor is military. Every time he says, "Yes,
25 sir," every time he answers, he's a rule follower. He follows

1 commands.

2 If anyone knows there is a hierarchy, it's Joey Rufo.
3 So he used what he thought was being supported by his company's
4 policy: If you see it, say it. In fact, under the company's
5 policies, you must say it if you see it. It's mandatory.

6 He's loyal to this company, but he also saw what he
7 believed was discrimination, and he took a personal risk. He
8 didn't have to do that, but he took a risk to point it out
9 under the belief that they would do something about it, and
10 what happened? Even if Jill Mecey meant well, they punished
11 him for that, and that's what this trial is about.

12 So this case is not really about Joey. This case is
13 about what the company did when it heard about discrimination.

14 I think we could stop right there, but because the
15 company has now after the fact said there were legitimate
16 reasons that they harshly reprimanded him, some of them coming
17 out for the first time today, on the last day of the trial,
18 they said they have reasons that they didn't give him a raise
19 and got rid of his job.

20 We have to talk about the legitimacy of those reasons
21 and assess them and see whether or not they were the real
22 reasons for his firing. We have proven that after Joey sends a
23 report to two of the heads of HR and compliance that shows
24 there's likely discrimination the way that discipline is being
25 applied, he suddenly goes from being a rock star to a horrible

1 employee in basically three days.

2 He's asked to do an analysis of the discipline that's
3 given out to the employees. He has permission to get into the
4 database for his regular job, and he asks if it's okay if he
5 goes forward.

6 Yes, he asks in the first e-mail they chart. He
7 tells them what he's suggesting he will do. He's not going off
8 on his own, on a tangent.

9 The e-mail he receives in response says, "Great
10 start." He never gets anything that says, "Joey, you need to
11 stop," or anything like that. HR basically drops the ball in
12 not responding to his description of what he's proposing to do,
13 but they won't -- none of them will admit to any
14 responsibility.

15 And they further drop the ball by admitting that they
16 didn't look at the attachment. They don't care about what the
17 data says. They didn't read the e-mail. They just care that a
18 lower-level -- or as their counsel referred to it, a
19 bottom-level -- employee, that's what they called Joey,
20 happened to take a look at their data and had the audacity to
21 think that they would care about knowing what he had seen in
22 the data.

23 Obviously, the discrimination he uncovered was not
24 important, they tell you. What was important? That he had
25 extracted race from people's personnel files? Even though, as

1 I mentioned earlier, he had all the permission he needed, since
2 he had put that data in about race in the first place every day
3 when you onboard the new employees.

4 Have they lost track of what's important here? That
5 he's offered some data that they didn't want to see, and that,
6 ladies and gentlemen, is the kicker. That's the essence here.
7 HR got the data, they failed to do anything with the data, and
8 they began to punish the messenger who brought it to them.
9 It's see no evil, hear no evil.

10 It's simply not credible that Salvo -- neither Salvo
11 nor Petrella read the e-mail. They berate him for his
12 communication, but they utterly failed to communicate with him.
13 They've not proven and they need to prove that this was just an
14 ordinary business decision. They have turned on him to make
15 little things sound like enormous issues, even though they were
16 never mentioned in their initial responses in this case.

17 For example, we heard the St. Louis trip. Yesterday
18 they raised this despite the fact it's not even mentioned in
19 any, any of the papers before that, any of the testimony before
20 that. What really happened there? Joey raises a question and
21 repeats it in a big room, and now they turn it into somehow
22 he's done something out of bounds. He's answered a question he
23 wasn't supposed to.

24 There's no documentation anywhere. They haven't
25 produced anything that that was an issue. Just another thing

1 that was tacked on.

2 If they were really concerned about any of his
3 behavior, couldn't they give him some coaching and a reminder?
4 Wouldn't he be able to deal with it?

5 No, they've got to put him on a scathing PIP three
6 days after -- two days after they start drafting it, after he
7 sends out data with the EEO analysis, and now what they're
8 doing at this trial is they're backtracking.

9 What is important, they give him a final written
10 warning and a PIP. They won't give him a raise, they take away
11 all his favorite work tasks that he excels at, and then they
12 come up with a reason to eliminate his job.

13 The defendant strains to defend what is in the end
14 indefensible. It's truly suspicious. But I get ahead of
15 myself.

16 Pretext. Have you heard that a lot? What does it
17 mean? Now, what does the company say? The company's lawyers
18 have tried to prove two defenses. First, they've tried to
19 prove that the PIP they put Joey on was really because of other
20 reasons than his reported potential discrimination.

21 Second, they tried to prove that the decision to fire
22 him was really because of an alleged need to eliminate his job
23 and had nothing to do with the fact that he had filed this
24 lawsuit against the company. That's their defense.

25 How do we know what really happened here? Well,

1 let's talk about the attacks on Joey. So they attack Joey and
2 make it sound like he's a complete maverick, bending the rules
3 or obsessively driven, where they tell him he cannot tell
4 anyone about what is happening or what he's discovered.

5 He respects their wishes, but unfortunately, there's
6 no turning back. He's quiet, but the cat's out of the bag. So
7 they continue to mistreat him. They try to deny that they were
8 motivated to get rid of him because he discovered something
9 that was very unpleasant to them.

10 The simple truth is that Aclara not only retaliated
11 against Joey; they renewed their attack on his credibility at
12 this trial. They called him a liar. You heard that again and
13 again. They called him dishonest.

14 Now, Joey may not be perfect. Joey may be ambitious
15 or even a bit, as we heard, overenthusiastic at times. Is that
16 such a crime?

17 He's not the villain they have made him into. He did
18 not deserve to get fired, this man. It was not a legitimate
19 business reason. It was retaliation, providing data they
20 didn't want to see or even consider.

21 Now, how do we know the HR team did not have a
22 legitimate business reason? Well, you have to consider the
23 credibility of the witnesses. You'll have to assess whether or
24 not their testimony rang true. How credible did they seem to
25 you in comparison to Joey? You decide that.

1 But let's look at the evidence as to timing, who Joey
2 is, excuses made up by HR. Let's go to timeline just to orient
3 one more time. Timing is everything, or at least one of the
4 most important things in a case like this in which there's
5 always an excuse for what the company did. It's not the real
6 reason.

7 Over the course of a few days, Joey goes from being a
8 rock star to being on a PIP in the final written warning. This
9 happened two days after they started drafting it, after he
10 submitted his EEO analysis.

11 All actions by Aclara happened after Joey brought
12 attention to their treatment of the SGS installers. There were
13 none before that. Then the lawsuit was filed on January 9.
14 Aclara was notified of the lawsuit on January 16. Three days
15 later, Joey is stripped of his onboarding responsibility,
16 something that was on his job description as a core
17 responsibility and had been part of his job from his very first
18 month at Aclara.

19 Then in April, he's given a scathing performance
20 review, no merit increase. He's given 1's. He's fired five
21 weeks later. Was that a surprise?

22 Let 's talk briefly about Joey some more. He's
23 motivated and hard-working. He's a performer. You've heard by
24 all accounts that he was very highly regarded at the company's
25 office. He's well respected. Everyone he worked with in

1 Virginia offices, they haven't brought anyone in from Virginia
2 who has anything critical to say about him.

3 You heard Alvin Jackson, probably knew him better
4 than any of these people that they testified to today about his
5 so-called faults.

6 Once he worked with Aclara, they say he was
7 uplifting. Others said he was a good communicator. They
8 offered him mentoring and progressively more responsibility.
9 And they did this because he's the person you see sitting here.
10 He's an honest, hard-working man. He just gets things done.

11 He successfully supervised the office move before he
12 was fired, as I mentioned. They want to minimize that, too.
13 This is the guy they claim doesn't have adequate judgment,
14 leadership, who's not a team player.

15 But Joey wanted to stick it out. He felt that he was
16 in the right to expose the possible discrimination. He wasn't
17 going to give up. They should have known better.

18 And you've got to wonder who was right about this
19 guy? Patty Cavender, the e-mail about the expense help;
20 Darlene Ican, another complimentary e-mail; or the HR people,
21 who were sent the disciplinary analysis and who used to love
22 him?

23 Joey's the real deal. He's going to be a success in
24 his job but perhaps something more challenging down the line.
25 He's still young and ambitious, and he needs training. And

1 he's far from the challenge that Jill Mecey said he was to
2 manage. One wonders if the problem was the supervisor or the
3 supervisee.

4 When they first started out, everything was good, she
5 says. They were friendly. She loved him. Then she didn't
6 like his all Reston office memo, but that was one minor event
7 and not one she considered significant until her higher-ups
8 were concerned about the disciplinary memo, and then the
9 analysis becomes the center of their relationship.

10 Let's talk for a moment about the analysis and the
11 alleged digging in the personnel files. It sounds awful until
12 you consider the facts, this digging. He added only one column
13 to the disciplinary form from the personnel files, all those
14 who identified as a particular race or mix of races.

15 He didn't mess around in the personnel files.
16 There's no testimony about that. He added a race column to the
17 disciplinary worksheet. He added up the numbers, he did the
18 math, and then he just saved his analysis on the computer since
19 the shared database was not operational for the data set. He
20 told them what he was going to do.

21 Well, HR freaked out not because of the data. That's
22 an excuse. Lyn and Jill and Michael Garcia -- Lyn Salvo, Jill
23 Mecey, and Michael Garcia set about finding ways to make sure
24 no one found out about the potential discoverage. That's what
25 they meant about damage control. That term is very telling.

1 They isolated and silenced Joey, and why? This is
2 not a data breach. This was not sent to anyone other than two
3 HR people that asked him to do the job.

4 Clearly, when he spoke up about the illegalities they
5 were doing, when he went back down, things got worse. Of
6 course, managing an employee who has a pending lawsuit against
7 a company is difficult. It's difficult for everyone, both the
8 employee and the employer, but again, the law protects the
9 employee. They're not allowed to make him uncomfortable or
10 punish him for offering data. That's retaliation, pure and
11 simple. And they cannot make up an excuse for why they did
12 that. That's pretext.

13 The real reason here, I think, is obvious why they
14 did what they did to him. His HR supervisor and her bosses
15 said he wasn't qualified to look at the discipline data, that
16 he was just an office coordinator, not qualified to do the job,
17 and they kept saying, "This was unauthorized," over and over
18 again, like a mantra, thinking you'd believe it if they kept
19 saying that. They acted as if it was not done in good faith.

20 He had no motive to hurt the company. He loved it
21 there. And he wasn't looking for a lawsuit, either. It's the
22 last thing he wanted to do.

23 So let's do a checklist again. He was asked -- Joey
24 is asked to do analysis of discipline patterns in the company.
25 He was permitted to access the database he was in not for any

1 purpose, but surely for the purpose of collecting data which
2 would be related to the discipline patterns, especially when he
3 asked for permission to go forward in the first e-mail.

4 And he heard -- all he heard was, "That's great.
5 Beautiful," from Lyn Salvo, and nothing else.

6 And Joey expected that the e-mail would be read by
7 the people he sent it to in its entirety. Shame on them if
8 it's actually true that neither Ms. Petrella or Ms. Salvo
9 actually read his e-mail.

10 Unauthorized, they claim. They try to insinuate he
11 was somehow overstepping his bounds. He just takes their
12 direction, asks for more direction, and it comes back to bite
13 him?

14 He tells them what he's proposing to do, and he tells
15 them where he will back up the data. Then he sends a second
16 e-mail a month later. A full month passes. No one responds.
17 The data is collected as he proposed, and he sends it only to
18 the two HR people, who have never said: Don't do this. Stop.
19 No, don't look at any data.

20 By the way, shame on Jill Mecey if she's the one
21 jumping in to discipline him when she says she has no idea
22 what's in the e-mail or the attachment. That's her contention
23 in this courtroom today. She didn't bother to look. Either
24 she's completely incompetent or she's not being truthful. And
25 she knows full well what the e-mail was about, that it

1 contained discrimination data, and that to punish Joey would be
2 retaliation.

3 And the same can be said of Lyn Salvo. She claims
4 she didn't look at the matrix. You have to assess whether or
5 not you believe that.

6 So what did they do? The PIP. There's no action
7 plan for improvement. There are no guidelines. There's no
8 time frame for improvement, just harsh criticisms for the
9 report. And then they have to pile it on.

10 They know they can't say it was just one judgment
11 error. They've got to create a pattern of errors, so they
12 start going back in time and recreating history. So they go
13 back to the other mistake Joey made and to which he owned up
14 and apologized, which he considered was no big deal when it
15 happened, no one told him it was.

16 He gets an e-mail from Jill saying: We have to do
17 everything possible to curb costs. Joey takes this literally
18 and translates a need to take action into a message about what
19 he had control over: the coffee area and special things people
20 wanted, superficial things. It was not alarmist. He wasn't
21 crying, "Fire," in the theater.

22 Now, remember, there was nothing in Jill's e-mail
23 that said don't tell anyone, and, in fact, even Jill Mecey
24 agreed that everyone already knew that because the company was
25 being purchased, that costs would need to be contained so the

1 company looked good on the books. That was common knowledge in
2 the Virginia office.

3 It was just an end-of-the-week wrap. It was buried
4 among two other items, something almost no one read, according
5 to Jill Mecey. He was just passing along information that
6 seemed like he was free to pass along, and people in the office
7 were already aware of it anyway.

8 So another nonissue, one they've trumped up and tried
9 to exaggerate the significance of after the discrimination data
10 is sent. Seizing upon it, greatly exaggerating it, using it
11 now as a pretext and excuse to find a way to punish him for
12 speaking up.

13 Now, on the PIP, they start piling on this lawsuit
14 with other things. Joey looked into trying to move into an HR
15 position that became available at his office. All he did was
16 ask the person who mentioned the job to him, Ms. Salvo, he made
17 it expressly conditional upon Jill Mecey's approval. He made
18 it very clear he wasn't going to look to move into that job
19 unless she expressly approved. He was just testing the waters.

20 They're going to persecute him for that? Is this a
21 crime for wanting to advance in an organization?

22 And the idea that Jill Mecey sat on Joey's so-called
23 lie for about seven weeks hoping he'd say something, that
24 sounds like something out of a lousy relationship, doesn't it?
25 It doesn't sound like a work relationship.

1 It's not subtle. They're doing things to make Joey
2 sound like a rogue employee. Nothing could be further from the
3 truth.

4 I'm going to reserve my remaining time, Your Honor.

5 THE COURT: All right.

6 CLOSING ARGUMENT

7 BY MR. FLOOD:

8 May it please the Court.

9 Good afternoon. We've been here for three full days,
10 long days, and when I was an Air Force JAG officer, they always
11 told us at trial strategy classes not to say thank you to the
12 jury. I'm not in the military now, so I can say I never agreed
13 with that because this is hard work. You have more hard work
14 ahead of you, but with that said, I want to say to you this
15 case, there are a lot of facts, dates, times, a lot of e-mails,
16 right? Binders on all the tables that are huge.

17 The case isn't that complicated when you look at its
18 core, when you consider the motivation, the testimony and the
19 documents that are -- will be before you that you've seen and
20 heard during this trial.

21 You may, you may have thought sitting here for three
22 days, Well, where's the photograph? You know, in today's CSI
23 culture, you know, we need photographs. We need visuals, not
24 just e-mails maybe or documents.

25 Here 's the photograph, Plaintiff's Exhibit 63. If

1 we can pull that up?

2 Can you pull that down just a little bit? And can
3 you zoom in just a little bit for us? Thank you very much.

4 I hope that's clear. This is Plaintiff's Exhibit 63,
5 and I don't want to state that too far, that it's a photograph,
6 but what this document is, ladies and gentlemen, it's the
7 equivalent of a photograph in a case where the plaintiff is
8 trying to prove to you the state of mind of Jill Mecey, Michael
9 Garcia, Lyn Salvo, and Gina Petrella, okay?

10 You've heard some testimony about this document.
11 What is this? Well, number one, why is this important? Look
12 at the date of this e-mail exchange: October. October 27.

13 Can we go on down and show the underlying message?
14 I'm sorry.

15 If you see that lower message, this is where Patricia
16 Cavender sent to e-mail to who? To Jill Mecey, October 27, and
17 she's praising Mr. Rufo, the plaintiff, for help he's given
18 her.

19 Can we go back on up towards the page? There we go.

20 What did Jill Mecey do? Did she delete? Did she
21 shred it? Did she just bury it somewhere? No. She sent it to
22 who? To Michael Garcia, her boss.

23 Look at Michael Garcia's comments. This was --
24 counsel read this to you, at least part of it, a few minutes
25 ago. This is talking about Ms. Cavender's praise of Mr. Rufo.

1 "That is a strong endorsement. It doesn't have
2 direct application to the situation and problems you are
3 experiencing with him," meaning Jill. "Very different areas of
4 behavior and expertise. Regardless, it is" -- what? It's
5 "good feedback. And it allows you" -- who's you? Jill
6 Mecey -- "an opportunity to share what he does well and
7 continue to work on the things he needs to work on" -- what, I
8 think it should say -- but "what you're very important as
9 well."

10 How does that fit timing-wise in this case? If you
11 recall, a lot of testimony. August 8 is when Mr. Rufo alleges
12 he first engaged in what the law deems protected activity,
13 okay? You recall that -- and we'll get to that in a minute.
14 That's an e-mail he sent to Lyn and to Gina, and attached to it
15 was a spreadsheet with that of not just about the disciplinary
16 actions he had been asked to complete, but the extra piece he
17 had not been asked to complete, never instructed to complete,
18 pulling race-related information for some people at least who
19 had been disciplined and attaching that, not just attaching it,
20 putting in his own purported analysis of it, okay?

21 So this October 27 is while he's still on the
22 performance improvement plan. It's purportedly, according to
23 Mr. Rufo's theory of this case, in the midst of the persecution
24 phase, when at every turn, Jill Mecey is supposedly coming
25 after him, trying to ruin him, saying bad things about him,

1 being unfair towards him, retaliating against him. That's his
2 allegations.

3 Jill didn't bury this e-mail. She sent it to her
4 boss.

5 Look at her boss's response. It's a fair, reasonable
6 response, and it shows you in a compelling way what's inside
7 the state of mind, if you will, of Mr. Garcia and Ms. Mecey in
8 particular and Aclara.

9 With due respect to the plaintiff and his right to
10 bring this case, it's nonsense, ladies and gentlemen. It's
11 nonsense. This is about an employee who couldn't accept
12 criticism, who couldn't accept that, hey, there are ways and
13 areas that he needed to improve his performance on, and that
14 resorted to alleging in this case falsely that he was the
15 victim of retaliation.

16 He wasn't -- this e-mail shows you in a compelling
17 way they can't refute what was inside the mind and hearts of
18 those two people. It ruins their case.

19 Let's look at slide 1, please. Counsel stated to you
20 at one point in his argument, he did state correctly -- and I
21 note the judge will instruct you she's, the Court has told you
22 this already. We'll give you instructions in just a few
23 minutes.

24 Counsel said, well, Mr. Rufo doesn't have to prove
25 that there was actual discrimination happening at Aclara in

1 relation to the race-related data he pulled without
2 authorization and the analysis he did without being asked, he'd
3 never done before regarding a very complicated issue.

4 Counsel said, well, what he, what he does need to
5 show is that he had a reasonable, good faith belief that
6 someone else's rights, basically, the SGS installers in this
7 case, were being discriminated against.

8 You'll have to decide for yourself when you hear the
9 judge's instructions what counsel left out, and this is
10 critical, ladies and gentlemen, what he didn't tell you when he
11 made that statement is that Mr. Rufo has to prove that he had
12 an objectively reasonable good faith belief that someone else's
13 right to be free from intentional racial discrimination was
14 being violated.

15 And that in particular, in relation to August 8 and
16 what he did on that day, objectively, in terms of what he was
17 thinking is critical. What does that mean? Subjective means
18 okay, maybe he really believed in his heart and mind or both
19 that he had found some data that was purportedly damaging to
20 the company or, you know, whatever he thought. That's
21 subjective.

22 Objective is wait a second. What would a reasonable
23 person think looking at his e-mail, looking at his data,
24 looking at his words, his words that he conveyed to Aclara on
25 different dates and times that are documented that are before

1 you in this case. That's the correct statement of the law on
2 whether or not he engaged in what's called protected activity,
3 which is really the first umbrella, large key decision point
4 for you in this case.

5 Let's go to the next slide. Aclara did not retaliate
6 against Mr. Rufo when it issued him a warning and performance
7 improvement plan on -- I believe it was August 15 of 2017.
8 Three key reasons.

9 Next slide, please. What's the first reason?
10 Aclara's management, in particular Ms. Mecey and then Michael
11 Garcia, had growing concerns about his conduct and performance
12 when? Before August 8, 2017. Okay? So they have growing
13 concerns about his performance and conduct before the date the
14 plaintiff alleges he engaged first in some form of protected
15 activity under the law.

16 What am I talking about? Next slide, please. Keep
17 going. No, go back. Please go back. Thank you.

18 What's the piece of evidence that relates to that?
19 The witness that most directly relates to that you heard from
20 today: Michael Garcia. He testified to you and Mr. -- talked
21 to him about this issue. He gave you his recollection of what
22 had happened.

23 Plaintiff's Exhibit 26, which you'll have before you,
24 this is maybe our second photograph, if you will, in the case
25 as to what's in the state of mind, the hearts of Mr. Garcia, in

1 this case, and Ms. Mecey's.

2 In this case, you'll see from the larger e-mail, if
3 you recall, this is where Jill Mecey reached out to Mr. Garcia
4 because the issue of Mr. Rufo pursuing pretty aggressively a
5 chance to interview for an HR management position with
6 Ms. Salvo, that issue developed. She told you what she thought
7 about it.

8 Did she, did she not want him to be able to progress
9 in the company? No, she progressed within this company for
10 six -- starting throughout her career. She's worked in really
11 lower-level position. She's still an executive assistant but
12 now with management-level responsibilities over that function
13 within SGS.

14 Mr. Garcia's response to Ms. Mecey's inquiry to him:
15 Hey, need your help in figuring out how to manage this issue,
16 that's what supervisors do, right? They manage employees.

17 He said, "By the way, I agree with your approach and
18 planned comments. He is rather presumptuous but also claims to
19 have good experience in the military that is applicable. His
20 behavior has to be adjusted."

21 Let's go back to the slide, please, Susie.

22 Timing. It's on the slide in front of you, ladies
23 and gentlemen. That e-mail from Mr. Garcia was by my count 28
24 days before Mr. Rufo alleges he first engaged in some form of
25 protected activity, okay?

1 Briefly, the next bullets on that slide, please,
2 Susie.

3 What are their growing concerns? Mr. Garcia talked
4 to you about that. It was, it was things that happened,
5 admittedly some small things, okay? It didn't formalize in
6 discipline. It built over time. It built over time to the
7 point they decided we need to formally address this issue.

8 This slide lists that out for you. Number one,
9 basically a conduct here in relation to the plaintiff's conduct
10 is trying to play a role he wasn't hired to do as an office
11 coordinator.

12 I want to be clear, one of our counsel said, well, he
13 was a low-level employee, but Aclara is not taking that
14 position in this case. They're not looking down on Mr. Rufo.
15 They're not, they're not diminishing what he had to do in his
16 responsibilities. But every team, right, to function well has
17 different team members. You can't have ten point guards --
18 strike that.

19 You can't have five point guards on the basketball
20 court at any one time. You can't have nine pitchers on the
21 baseball field at one time. The team doesn't function that
22 way.

23 Mr. Rufo was a part of the team. He was new. He was
24 in an office coordinator position, with certain
25 responsibilities. He was not in an HR-specific position. He

1 wanted to be. That's great. Ms. Mecey made clear to you,
2 Mr. Garcia as well, they didn't resent that. They didn't
3 begrudge it. In fact, that's to be commended. If you want to
4 go higher and farther, Aclara is just the company to do it, we
5 know from Ms. Mecey's own experience, right? It's a place you
6 can do that in your career.

7 What Mr. Garcia's response reflects -- and this is an
8 important concept under the law that you'll be instructed on in
9 this case. It's called business judgment.

10 Please, next slide.

11 You'll be given an instruction -- please go ahead --
12 the key concept, but I want -- with all the instructions,
13 listen carefully to the details, okay? But the headline of
14 this instruction is that this case is not about just
15 second-guessing. You know, okay. Well, Mr. Garcia thought on,
16 I think, July 11, 2017, that the plaintiff's behavior had to be
17 changed. He's wrong. Therefore, Aclara must be guilty of
18 something.

19 That's not the role of this case, and respectfully,
20 I'd submit that's not your role due in part to this instruction
21 you'll get called business judgment.

22 The judge will tell you, I'm going to paraphrase, I
23 don't want to be misleading about it, employers have a right
24 under the law to make business decisions. We all know that.
25 It just can't be motivated by an illegal reason, okay? Aclara

1 can make its own subjective personnel decisions.

2 And with due respect, regardless of whether you when
3 you're deliberating agree or not with certain decisions, that's
4 really not the issue before you. That's really not your charge
5 in deciding the relevant, material issues of this case.

6 Mere disagreement or belief that a decision was harsh
7 or unreasonable is not a proper basis to find for the
8 plaintiff. You'll be told that.

9 What is the relevant issue, was retaliation the
10 motivating factor, and any of the decisions in terms of the
11 decision to put him on a warning and PIP, and some of the later
12 issues we'll talk about briefly in this case.

13 Next slide, please.

14 The second reason, the company did not retaliate
15 against him. He did not engage in protected activity in
16 relation to his e-mail or the data that he sent to Lyn and Gina
17 on August 8, 2017.

18 Let's look at the next slide.

19 All right. You're going to have Plaintiff's Exhibit
20 33. You've seen a lot of -- seen that handled a lot with
21 witnesses. We don't need to go through it in great detail
22 here, but this is the e-mail Mr. Rufo is saying, hey, you know,
23 this e-mail and then the data connected to it on the
24 race-related issue that he assembled is protected activity.

25 Let's go back to the slide. The first bullet

1 reflects what I just covered with you in terms of the actual
2 instruction you'll get that Mr. Rufo has to prove that the
3 e-mail and the data he assembled relating to race and employees
4 having been disciplined, it has to meet a standard of being --
5 reflecting an objectively reasonable, good faith belief that
6 someone else's right to be free from intentional race
7 discrimination was being violated.

8 Not only that; he has to show that he opposed what he
9 reasonably believed to be intentional discrimination.
10 Opposition to such, I'm paraphrasing that, cannot be equivocal,
11 but instead, he must show that he stood in opposition to it,
12 not just objectively reported its existence or attempted to
13 serve as the intermediary.

14 Next slide. We know from plaintiff's e-mail of
15 August 8, he cannot meet that standard under the law, and with
16 due respect, and you'll be told this, you're here to apply the
17 law, ladies and gentlemen. That's part of your charge. How do
18 we know from his words, not my words, not his counsel's words,
19 Mr. Rufo's words in that e-mail?

20 What did he say, briefly? You've heard a lot of
21 about this. "This isn't very informative at the moment
22 because" -- what? "We lack sufficient amounts of data to give
23 this relevancy. However, as time goes on, this analysis
24 becomes less skewed and more representative of how we're
25 tracking a relation and how it should be tracking.

1 What do we know? He said to Lyn and Gina on August 8
2 it's not very informative. What's he talking about? The
3 race-related data he had pulled and assembled himself. Why?
4 Because we lack sufficient amounts of data to give it this
5 relevancy.

6 He went on to basically acknowledge through the third
7 line that it was skewed data because you needed more time to
8 track that type of issue.

9 Next slide. Plaintiff's Exhibit 38, which you'll
10 also have in your deliberation room. What is this? This is
11 his -- I believe it's his instant message exchange with
12 Ms. Mecey.

13 He says, "Long story short: I included an EEO
14 analysis in my terms and discipline report, and I don't think
15 Lyn appreciated it like I hoped she would."

16 Briefly, why did he do this? I would submit to you
17 he was trying to do it to impress Lyn Salvo, who he called,
18 what, a legend, right? Who he was pursuing a job with as an HR
19 business partner. Okay?

20 Now, does that mean -- what does that mean? I mean,
21 if you want the answer for why he did this without being asked
22 to, without being directed to, I would submit to you that's an
23 answer. That is the answer.

24 He goes on to say in this instant message exchange,
25 "It only went to her and Gina, and I included" -- what? --

1 "only numerical values with no opinions."

2 The judge will instruct you in relation to the legal
3 concept of protected activity, he's got to meet that objective
4 good faith standard, okay, not just a subjective standard, and
5 he's got to stand in opposition. That e-mail and that text
6 message exchange shows that wasn't the case, and he can't make
7 it the case no matter how bad he wants to sitting in this
8 courtroom this week.

9 Next slide, please. Those two exhibits show you
10 there's no reference at all to the issue of possible race
11 discrimination, no objective good faith relief on Mr. Rufo's
12 part that others are being discriminated against. And I listed
13 there again the words that we just covered. We're not going to
14 read them it again.

15 Next slide, please. What's more evidence, we know
16 that he doesn't meet the standard for protected activity
17 regarding his activity -- regarding what he did on August 8 in
18 terms of that e-mail and the race data that he pulled and
19 assembled. A lot of e-mails in this case. You've looked at
20 them probably until you're blurry-eyed.

21 Not a single one, not a single one has Mr. Rufo
22 saying, hey, ladies and gentlemen within Aclara, I believe
23 there's some form of discrimination going on based on race
24 regarding the SGS workforce.

25 He's saying it now. The one time he says he said it

1 to someone was in a conversation with Lyn Salvo by phone, when
2 he says he told her: Lyn, I think this data reflects
3 intentional systemic -- meaning company-wide -- discrimination.
4 He's not an expert. He's never done that type of analysis
5 before. And, oh, by the way, he didn't record that call, so we
6 can't hear what he said. He hadn't produced any notes from
7 that call. We can't know what he said from his notes.

8 Next slide, please. What he says now has to be
9 judged by what he said then because the state of the mind of
10 the company personnel is critical. They can't be judged on
11 what he said this week in the courtroom in terms of the impact
12 and their state of mind. It's what he said then.

13 Next slide. The next two slides I have for you list
14 out different points. Why? The data that he pulled and
15 assembled on race for certain SGS employees who had been
16 disciplined is not relevant and is not reliable. Ms. Petrella
17 in particular talked to you about that today, their compliance
18 officer, if you will, within human resources.

19 The plaintiff, Mr. Rufo, admitted to several of these
20 points when I asked him questions yesterday.

21 Let's go to the next slide. Different managers,
22 different places, different facts, different policies at issue,
23 conduct. No accounting for project-specific racial makeup of
24 the workforce. D.C. Water site, for example, what was the
25 makeup of the workforce on that site for Aclara versus a site

1 in Minnesota. Obviously, that could be dramatically different,
2 but that data wasn't in there, and that led Aclara, the team
3 that looked at it, to conclude this isn't relevant and reliable
4 data. Plaintiff is trying to blame Aclara, to say they ignored
5 it. Far from the truth.

6 Next slide. We know from his own words he doesn't
7 meet the standard for protected activity.

8 Next slide, please. Next slide.

9 The third reason is -- go ahead. We know, we know
10 that beginning with that e-mail from Mr. Garcia, that exchange
11 of July 11, 2017, what was in their minds in relation to
12 Mr. Rufo as an employee. Mr. Garcia said on that date his
13 behavior has to change, okay? That's the framework, the
14 context from which you need just to make a decision regarding
15 the motivations in play on August 8.

16 Next slide, please. We will be brief on these
17 points. December 19, Ms. Mecey told him she would take him off
18 the PIP. It did come up in the conversation that he would not
19 get a merit increase for 2017 because of those performance
20 issues, and, oh, by the way, that conversation happened before
21 this lawsuit was filed. That's critical for you to consider.
22 What plaintiff's position in his assertions reflect, mere
23 disagreement with Ms. Mecey especially in her business
24 decisions on how to manage him as an employee.

25 Next slide. The performance evaluation, you heard,

1 you heard the audio recording from the discussion between
2 Ms. Mecey and the plaintiff in April. What you heard -- and
3 you'll have, I believe, the recording with you. You can listen
4 to it again if you want. You'll have the transcript of it.
5 What you heard was Ms. Mecey being a manager, but what you
6 heard are the words and the honest state of mind of a person
7 who -- Ms. Mecey did not know that call was being recorded.

8 Listen to the end of the two recordings. We played
9 it yesterday. What they show, with due respect, is that this
10 plaintiff, he knew he was continuing to record Ms. Mecey in
11 that April conversation. He absolutely knew. You hear him at
12 the end announce the date and time into that recorder when the
13 call ended.

14 He knew it. He didn't tell her. He didn't alert
15 her. He didn't have the courtesy to do that.

16 You know what? That's powerful evidence because all
17 she did was try to be a manager to him. She adjusted one of
18 his ratings upward and otherwise let him talk, and she
19 responded. That's called managing an employee.

20 Next slide. Finally, and I'll wrap this up with this
21 because I'm short on time: The decision to eliminate his
22 position, number one, consider the timing. They're trying to
23 hinge that in terms of retaliation on the date the lawsuit was
24 filed, I think January 9. That decision was made in May,
25 effective June 4. That's months after the fact.

1 Look, if they -- use your common sense, and the judge
2 will instruct you on that. If they were out to get him, if
3 they were out to retaliate against him for filing that lawsuit,
4 they wouldn't have fired him like that. Why wait?

5 Q. You've heard the other evidence. There are a couple of
6 memos in the file that are in evidence for Ms. Mecey regarding
7 the decision to eliminate not just the coordinator position in
8 Herndon but also basically the position in New Hampshire for a
9 much larger office and operation. They made the decision to
10 not have someone come back to that position full time.

11 Ladies and gentlemen of the jury, the evidence is
12 clear. We've presented to you the two photographs, if you
13 will, that I talked about. They show you all this is is a case
14 of a plaintiff who -- and the company respects him, respects
15 his military service. That's not what this case is about, with
16 due respect.

17 They made management decisions they thought were
18 right. It's not about retaliation. That wasn't their
19 motivation, and he can't accept that, but that doesn't mean he
20 wins. Thank you.

21 THE COURT: Okay.

22 REBUTTAL ARGUMENT

23 BY MR. FOX:

24 It's all about retaliation. One thing we agree upon:
25 They sure did adjust his behavior, didn't they? The notion

1 that he had an objectively reasonable belief that there was
2 discrimination going on when he found out that African
3 Americans were being disciplined at four times the rate of
4 everybody else? Given the sample size he had, given the data
5 he uncovered, that doesn't fly. That doesn't permit them to
6 avoid liability.

7 The notion that they didn't react to the filing of
8 this lawsuit, ultimately a termination, that doesn't fly,
9 either. Of course, they're not going to terminate him right
10 after the lawsuit was filed. They're not that stupid.

11 They did remove his onboarding duties within three
12 days. That wasn't that smart.

13 But the reality is he made it very clear what he was
14 complaining about. There was no question he was complaining
15 about racial disparities. It was apparent from the
16 spreadsheet.

17 He told Jill Mecey. You've got to believe him or
18 Jill Mecey who's telling the truth here. You've got to look at
19 Jill Mecey's notes, where she documents what he told her. He
20 complained about retaliation. She admits that. If he's
21 complaining about retaliation, what's the retaliation over?
22 It's obviously got to be over the spreadsheet. It's not
23 anything else. That's the only thing that he produced.

24 Recall their witnesses. You assess their
25 credibility. Alvin Jackson, the lone exception, everyone else

1 gets in line.

2 Garcia, he's the top of the pyramid. He's the next.
3 He claims to know nothing. He claims that he didn't know
4 that Joey had complained of retaliation for reporting
5 discrimination, yet Jill Mecey said in her testimony yesterday
6 she told him.

7 Look at the untruthfulness. Petrella sunk herself in
8 when she said Joey had displayed initiative and suggested that
9 she should investigate further. She sunk herself. She
10 admitted she didn't do anything further.

11 All claimed not to know anything about the primary
12 details of this case. Really? Please? It's as if they
13 weren't discussed or they weren't advised of the details by the
14 lawyers?

15 And they keep coming up with new ideas. The very
16 last day of this trial, the head count wasn't right. They're
17 claiming financial issues with no documentation. The
18 affirmative action audits that we've never seen. Is there any
19 substance to these tacked-on arguments?

20 They should have been the ones who were eliminated
21 for gross dereliction of duty. They turned a blind eye to the
22 whole thing, the whole thing.

23 I'd like to talk to you a little bit about damages,
24 and I'd like to put up the verdict form.

25 This has affected Joey. You heard Sienna's

1 testimony: He's stoic, as she described it. He continues to
2 experience emotional distress caused by having to go to work
3 every day. This is one of the hardest experiences in his life.
4 He didn't get up on the stand and cry about it. He's the one
5 that lost his job. He's the one that lost his benefits. He's
6 the one who's lost his career.

7 Now, in the verdict form, you'll be asked -- if we
8 could put up the first question? -- "Do you find, by a
9 preponderance of evidence, in favor of plaintiff, Joseph Rufo,
10 on his claim for retaliation?"

11 I would ask you to check "Yes."

12 On the next item, "What sum of money would fairly and
13 reasonably compensate plaintiff, Joey Rufo, for damages, if
14 any, that you have found defendant, Aclara Technologies, LLC,
15 caused him? Answer for the following items."

16 You'll have to calculate his back pay based upon what
17 you know. Pain and suffering, inconvenience, mental anguish,
18 and loss of enjoyment of life. Now, this includes, as you'll
19 learn in the jury instructions, about long-term damage to his
20 career, something that has both tangible economic and
21 intangible social value. We'll ask you to fill in that blank
22 with a million-dollar award, and we'll ask you to total the
23 amounts.

24 The next item, and this is the most important part of
25 the verdict form: Do you find by a preponderance of the

1 evidence that Aclara acted with malice and reckless
2 indifference to the rights of Mr. Rufo?

3 We'll have won the battle but lost the war if you
4 don't check "Yes."

5 Employer acts with malice or reckless indifference
6 when it knows or should have known what it's doing is illegal
7 but does it anyways. There's no question Aclara knew that
8 retaliation was illegal. Mecey, Salvo, Petrella, Garcia, they
9 all knew exactly what they were doing.

10 No one is willing to take responsibility. No one is
11 willing to take any accountability. No one is willing to admit
12 that they've dropped the ball. You've got to make the decision
13 as to whether or not they dropped the ball. You've got to
14 determine if they acted with reckless indifference.

15 We think they did. They paid lip service to their
16 rules on retaliation discrimination. Look at what the company
17 did. Don't look at what it says. What difference does it make
18 what their rules say if they treat people like this?

19 We ask you to stand for Joey Rufo and return a
20 verdict in his favor. Thank you.

21 THE COURT: All right. I'll let the jurors just move
22 down a little bit so I can see everybody's face.

23 And we will not permit people to come and go in the
24 courtroom, so anyone who wants to leave needs to leave now.
25 All right.

1 All right. Ladies and gentlemen, now that you have
2 heard all of the evidence that is to be received in this trial
3 and each of the arguments of counsel, it becomes my duty to
4 give you the final instructions of the Court as to the law that
5 is applicable to this case. You should consider these
6 instructions to guide you in your decisions.

7 Now, all of the instructions of law given to you by
8 the Court -- those given to you at the beginning of the trial,
9 those given to you during the trial, and these final
10 instructions -- must guide and govern your deliberations.

11 It is your duty as jurors to follow the law as stated
12 in all of the instructions of the Court and to apply these
13 rules of law to the facts as you find them from the evidence
14 received during the trial.

15 Now, counsel have quite properly referred to some of
16 the applicable rules of law to you in their closing arguments.
17 If, however, any difference appears to you between the law as
18 stated by counsel and that as stated by the Court in these
19 instructions, you, of course, are to be governed by the
20 instructions given to you by the Court.

21 You are not to single out any one instructions alone
22 as stating the law but must consider the instructions as a
23 whole in reaching your decisions. Neither are you to be
24 concerned with the wisdom of any rule of law stated by the
25 Court.

1 Regardless of any opinion you may have as to what the
2 law ought to be, it would be a violation of your sworn duty to
3 base any part of your verdict upon any other view or opinion of
4 the law than that being given in these instructions, just as it
5 would be a violation of your sworn duty as the judges of the
6 facts to base your verdict upon anything but the evidence
7 received in the case.

8 You were chosen as jurors for this trial in order to
9 evaluate all of the evidence received and to decide each of the
10 factual questions presented by the allegations brought by the
11 plaintiff, Joseph Rufo, in his complaint and the denial of
12 those allegations by the defendant, Aclara Technologies, LLC.

13 In resolving the issues presented to you for decision
14 in this trial, you must not be persuaded by bias, prejudice, or
15 sympathy for or against any of the parties to this case or by
16 any public opinion.

17 Justice through trial by jury depends upon the
18 willingness of each individual juror to seek the truth from the
19 same evidence presented to all the jurors here in the courtroom
20 and then to arrive at a verdict by applying the same rules of
21 law as are now being given to each of you in these
22 instructions.

23 Now, there's nothing particularly different in the
24 way that a juror should consider the evidence in a trial from
25 that in which any reasonable and careful person would deal with

1 any very important question that must be resolved by examining
2 facts, opinions, and evidence. You are expected to use your
3 good sense in considering and evaluating the evidence in the
4 case. Use the evidence only for those purposes for which it
5 has been received, and give the evidence a reasonable and fair
6 construction in the light of your common knowledge of the
7 natural tendencies and inclinations of human beings.

8 Now, the evidence in this case consists of the sworn
9 testimony of the witnesses, regardless of who may have called
10 them, all exhibits received in evidence, regardless of who may
11 have produced them, and all facts which may have been agreed or
12 stipulated to.

13 When the attorneys on both sides stipulate or agree
14 as to the existence of a fact, you may accept the stipulation
15 as evidence and regard the fact as proved. You are not
16 required to do so, however, since you are the sole judges of
17 the facts.

18 Now, the Court has -- all right.

19 Any proposed testimony or proposed exhibit to which
20 any objection was sustained by the Court and any testimony or
21 exhibit ordered stricken by the Court must be entirely
22 disregarded. Anything you may have seen or heard outside the
23 courtroom is not evidence and must be entirely disregarded.

24 The questions, objections, statements, and arguments
25 of counsel are not evidence in the case unless made as an

1 admission or a stipulation of fact. You are to base your
2 verdict only on the evidence received in the case. In your
3 consideration of the evidence received, however, you are not
4 limited to the bald statements of the witnesses or to the bald
5 assertions in the exhibits. In other words, you're not limited
6 solely to what you see and hear as the witnesses testify or as
7 the exhibits are admitted. Instead, you are permitted to draw
8 from the facts which you find have been proved such reasonable
9 inferences as you feel are justified in the light of your
10 experience and common sense.

11 Inferences are simply deductions or conclusions which
12 reasonable -- I'm sorry, which reason and common sense lead the
13 jury to draw from the evidence received in this case.

14 Now, testimony and/or exhibits can be admitted into
15 evidence during a trial only if it meets certain criteria or
16 standards. It is the sworn duty of the attorney on each side
17 of a case to object when the other side offers testimony or an
18 exhibit which that attorney believes is not properly admissible
19 under the rules of law. Only by raising an objection can a
20 lawyer request and then obtain a ruling from the Court on the
21 admissibility of the evidence being offered because the
22 attorney has made an objection.

23 Now, do not attempt to interpret my rulings on
24 objections as somehow indicating how I think you should decide
25 the case. I am simply making a ruling on a legal question

1 regarding that particular piece of testimony or exhibit.

2 It is the duty of the Court to admonish an attorney
3 who, out of zeal for his or her cause, does something which I
4 feel is not in keeping with the rules, evidence, or procedure.

5 You are to draw absolutely no inference against the
6 side to whom an admonition of the Court may have been addressed
7 during the trial of this case.

8 And during the course of the trial, I occasionally
9 ask questions of a witness. Do not assume that the Court holds
10 any opinion on the matters to which a question may have
11 related. The Court may ask a question simply to clarify a
12 matter, not to help one side of the case or hurt the other.

13 And remember at all times that you as the jurors are
14 the sole judges of the facts of the case. In other words, no
15 matter what the Court says about the evidence or what the
16 lawyers say does not control. It's what you, the fact finders,
17 find.

18 I think I've told you several times during the trial
19 that the questions asked by a lawyer for either party to this
20 case are not evidence. If a lawyer asks a question of a
21 witness which contains an assertion of fact, therefore, you may
22 not consider the assertion by the lawyer as any evidence of
23 that fact. Only the answers of the witness are evidence.

24 And if any reference by the Court or by counsel to
25 matters of testimony or exhibits does not coincide with your

1 own recollection of that evidence, it is your recollection
2 which should control during your deliberations and not the
3 statements of the Court or of counsel.

4 Now, in coming to your decisions on the facts of this
5 case, you should not be determined by the number of witnesses
6 testifying for or against a party or by the number of exhibits
7 introduced by one side or the other.

8 You should consider all of the facts and
9 circumstances in evidence to determine which of the witnesses
10 you choose to believe or not believe and which of the exhibits
11 have more or less value. You may find that the testimony of a
12 smaller number of witnesses on one side is more credible than
13 the testimony of a greater number of witnesses on the other
14 side or that one or two exhibits may have more significance to
15 your evaluation of the case as against numerous exhibits which
16 you find have less significance.

17 To sum up this instruction, always consider the
18 quality of the evidence rather than the quantity of the
19 evidence.

20 Now, there are two types of evidence that are
21 generally presented during a trial, and they're called direct
22 evidence and circumstantial evidence. Direct evidence is the
23 testimony of a person who asserts or claims to have actual
24 knowledge of a fact, such as an eyewitness. Circumstantial
25 evidence is proof of a chain of facts and circumstances

1 indicating the existence of a fact.

2 An example of circumstantial evidence is the
3 following: You leave your home at noon on a cold February day.
4 Your front yard is bare at the time. It then starts to snow,
5 and you return at 5 p.m., and you see a footprint in the snow
6 that now covers your front yard.

7 From the facts that you left your home at noon and
8 returned at 5 p.m., that you see, that is, you have direct
9 evidence of a footprint, and you know from common experience
10 that human beings are normally associated with footprints, you
11 can infer that there was a person in your yard sometime between
12 noon and 5 p.m.

13 If you had actually seen a person, that would be
14 direct evidence of the fact. Because you haven't seen the
15 person, however, you can assume or conclude that there was
16 someone in your yard from these other facts. That's called
17 circumstantial evidence.

18 Now, the law makes no distinction between the weight
19 or value to be given to either direct or circumstantial
20 evidence, nor is a greater degree of certainty required of
21 circumstantial evidence than of direct evidence. You should
22 weigh all the evidence in the case in making your decisions.

23 Now, typewritten transcripts of recorded
24 conversations have been introduced in this case, and as I told
25 you when the conversations came in, recordings of conversations

1 have been received in evidence and played for you, and
2 typewritten transcripts of these recordings have been furnished
3 to you. The transcripts of these conversations are being given
4 to you solely for your convenience in assisting you in
5 following the conversations or in identifying the speakers.

6 In all instances, it is the recording itself that's
7 evidence, and the typewritten transcript is not. And I believe
8 I told that to you during the trial. So what you hear on the
9 recording is the evidence; what you read on the transcript is
10 not. If you perceive any variation between the two, you will
11 be guided solely by the recording and not the transcript.

12 If you cannot, for example, determine from the
13 recording that particular words were spoken or if you cannot
14 determine from the recording who said a particular word or
15 words, you must disregard the transcript insofar as those words
16 or that speaker are concerned.

17 In certain instances, evidence may be admitted only
18 for a particular purpose and not generally for all purposes.
19 For the limited purpose for which this evidence has been
20 received, you may give it such weight as you feel it deserves.
21 You may not, however, use this evidence for any other purpose
22 not specifically mentioned.

23 Now, the next couple of instructions are going to go
24 towards how you evaluate the credibility of witnesses, and the
25 word "credibility" simply means the degree to which you're

1 going to believe any witness.

2 You as jurors are the sole and exclusive judges of
3 the credibility of each of the witnesses called to testify in
4 this case, and only you determine the importance or the weight,
5 if any, that their testimony deserves. After making your
6 assessment concerning the credibility of a witness, you may
7 decide to believe all of the witness's testimony, only a
8 portion of it, or none of it at all.

9 In making your assessment of that witness -- of each
10 witness, you should carefully scrutinize all of the testimony
11 given by that witness, the circumstances under which each
12 witness has testified, and all of the other evidence which
13 tends to show whether a witness in your opinion is worthy of
14 belief.

15 Consider each witness's intelligence, motive to
16 falsify, state of mind, and appearance and manner while on the
17 witness stand. Consider the witness's ability to observe the
18 matters as to which he or she has testified, and consider
19 whether he or she impresses you as having an accurate memory or
20 recollection of these matters.

21 Consider also any relation a witness may bear to
22 either side of the case, the manner in which each witness might
23 be affected by your verdict, and the extent to which, if at
24 all, each witness is either supported or contradicted by other
25 evidence in the case.

1 Now, inconsistencies or discrepancies in the
2 testimony of a witness or between the testimony of different
3 witnesses may or may not cause you to disbelieve or discredit
4 such testimony. Two or more persons witnessing an incident or
5 a transaction may simply see or hear it differently. Innocent
6 misrecollection, like failure of recollection, is not an
7 uncommon human experience. However, in weighing the effect of
8 a discrepancy, always consider whether it relates to a matter
9 of importance or to an insignificant detail, and consider
10 whether the discrepancy results from innocent error or from
11 intentional falsehood.

12 After making your own judgment or assessment
13 concerning the believability of a witness, you can then attach
14 such importance or weight to that testimony, if any, that you
15 feel it deserves.

16 The testimony of a witness may be discredited, or as
17 we say in the law, impeached, by showing that he or she
18 previously made statements which are different than or
19 inconsistent with his or her testimony here in court. The
20 earlier inconsistent or contradictory statements are admissible
21 only to discredit or impeach the credibility of the witness and
22 not to establish the truth of these earlier statements made
23 somewhere other than here during the trial.

24 It is the province of the jury to determine the
25 credibility of a witness who has made prior inconsistent or

1 contradictory statements.

2 The testimony of a witness may also be discredited by
3 showing that the witness will benefit in some way by the -- I'm
4 sorry, this is not the right instruction.

5 The testimony of a witness can be discredited also by
6 showing that the witness might have bias favoring either the
7 plaintiff or the defendant in this case, and so you must look
8 at any evidence that may or may not be in the case as to the
9 bias of any witness.

10 You should consider and decide this case as a dispute
11 between persons of equal standing in the community, of equal
12 worth, and holding the same or similar stations in life. A
13 corporation is entitled to the same fair trial as a private
14 individual. All persons, including corporations and other
15 organizations -- and in this case, the defendant is an LLC, but
16 it's basically the same thing -- stand equal before the law and
17 are to be treated as equals.

18 Now, the next instructions get into some of the
19 actual details of the specific issues in this case. So in this
20 case, the plaintiff, Joseph Rufo, has made a claim under Title
21 42 of the United States Code, Section 1981, which is a federal
22 civil rights statute that prohibits discrimination against an
23 employee because of the employee's race. Section 1981 also
24 prohibits employers from retaliating against an employee for
25 engaging in protected activity, such as reporting

1 discrimination in the workplace.

2 The purpose of Section 1981's prohibition on
3 retaliation is to protect Section 1981's prohibition on
4 intentional discrimination in employment. If employees are
5 afraid of retaliation by their employers for reporting
6 discrimination, they may be discouraged from reporting such
7 conduct.

8 In this lawsuit, you must determine whether
9 defendant, Aclara Technologies, LLC, retaliated against
10 Mr. Rufo for engaging in activity protected by Section 1981.
11 If you find that it did, you must assess what, if any, damages
12 Mr. Rufo should receive. You are not here to determine whether
13 Aclara engaged in discrimination.

14 Aclara denies that Mr. Rufo was retaliated against in
15 any way.

16 Now, to prevail on this claim against Aclara,
17 Mr. Rufo must prove each and every one of the following three
18 facts by a preponderance of the evidence:

19 One, that he engaged in protected activity;

20 Two, that Aclara took an action or actions against
21 Mr. Rufo that a reasonable employee would have found materially
22 adverse; and

23 Three, that Aclara would not have taken some or all
24 of these actions if not for Mr. Rufo's protected activity.

25 Now, Section 1981 protects employees who make a claim

1 of racial discrimination or retaliation or participate in any
2 manner in a claim of discrimination or retaliation or in any
3 related investigation or proceeding.

4 In this case, Mr. Rufo asserts that he engaged in two
5 protected activities: one, that he began tracking what he
6 described as the disproportionate amount of discipline issued
7 to certain SGS installers by race; and two, that he filed this
8 lawsuit alleging retaliation for engaging in that protected
9 activity.

10 As to the first claimed protected activity, that is,
11 filing the report or preparing and filing the report, Mr. Rufo
12 does not have to prove that Aclara actually engaged in
13 discrimination against the SGS installers. That is not an
14 issue in this case and not for you to decide or consider.
15 Rather, to establish that his reporting the disproportionate
16 amount of discipline issued on a racial basis constitutes
17 protected activity, Mr. Rufo must prove by a preponderance of
18 the evidence that he had an objectively reasonable good faith
19 belief that someone else's right to be free from intentional
20 racial discrimination was being violated.

21 Furthermore, Mr. Rufo must prove by a preponderance
22 of the evidence that he opposed what he reasonably believed to
23 be intentional discrimination. Opposition to unlawful
24 discrimination cannot be equivocal, but instead, Mr. Rufo must
25 have stood in opposition to it, not just objectively -- not

1 just objectively reported its existence or attempted to serve
2 as an intermediary.

3 As for the second claimed protected activity, which
4 again is the filing of this lawsuit, I have already ruled that
5 Mr. Rufo's filing of this lawsuit alleging retaliation is
6 protected activity, and you should treat it as such for the
7 purposes of your deliberations.

8 Now, a materially adverse employment action is any
9 action by an employer, in this case Aclara, that is likely to
10 discourage a reasonable employee in Mr. Rufo's position from
11 exercising his rights under Section 1981.

12 I have already ruled that the following actions by
13 Aclara toward Mr. Rufo were materially adverse:

14 One, placing Mr. Rufo on a written warning and
15 performance improvement plan;

16 Two, giving Mr. Rufo a negative performance review;

17 Three, denying Mr. Rufo a merit salary increase; and

18 Four, terminating Mr. Rufo's employment.

19 You should consider these actions by Aclara to be
20 materially adverse for the purposes of your deliberations.

21 Now, Mr. Rufo must also prove that Aclara would not
22 have taken its materially adverse employment actions against
23 him but for any protected activity that he engaged in. To
24 prove this, he does not need to show that his protected
25 activity was the sole factor in the decisions Aclara took

1 against him. Instead, Aclara may be held liable for
2 retaliation even if other factors contributed to the adverse
3 employment action, so long as retaliation was the factor that
4 made the difference.

5 Ultimately, you must decide whether any protected
6 activity by Mr. Rufo was the determinative factor on the
7 disciplinary action that was taken by Aclara. "Determinative
8 factor" means that if not for Mr. Rufo's actions, the
9 disciplinary action or actions would not have occurred.

10 Mr. Rufo has the burden of proving Aclara's
11 retaliatory intent. Retaliation is intentional if it is done
12 voluntarily, deliberately, and willfully. However, Mr. Rufo is
13 not required to have direct evidence of retaliatory intent.
14 Mr. Rufo can present direct or circumstantial evidence to show
15 that his claimed protected activity caused Aclara's materially
16 adverse actions against him.

17 Direct evidence of retaliation is remarks or actions
18 that, if believed, prove that Mr. Rufo's claimed protected
19 activity was the cause of Aclara's materially adverse actions
20 against him.

21 Indirect or circumstantial evidence includes proof of
22 a set of circumstances that allow you to reasonably believe
23 that Mr. Rufo's claimed protected activity was the cause of the
24 materially adverse actions that Aclara took against him.

25 Circumstantial evidence can be shown by suspicious

1 timing of events, ambiguous or contradictory statements, and
2 other bits and pieces of information from which you infer an
3 intent to retaliate. Evidence of a pattern of retaliatory
4 conduct occurring soon after protected activity occurs could
5 also raise an inference of retaliatory motive.

6 In making a determination as to whether there was
7 intentional retaliation in this case, you may consider any
8 statement made or act done or omitted by a person whose intent
9 is at issue, as well as all other facts and circumstances that
10 indicate his or her state of mind.

11 Mr. Rufo claims that Aclara's stated reasons for its
12 materially adverse employment actions are not the true reasons,
13 but instead, pretext or excuses to cover up for retaliation.
14 If you find based on the facts that defendant's explanations
15 for its adverse actions against Mr. Rufo are not worthy of
16 belief, then you may, but need not, draw the inference that
17 retaliation was the true reason Mr. Rufo was subject to those
18 actions.

19 When deciding Mr. Rufo's retaliation claim, you must
20 keep in mind that an employer is entitled to make business
21 decisions for any reason, whether good or bad, so long as those
22 decisions are not motivated by a factor that is illegal, such
23 as retaliation. Accordingly, Aclara is entitled to make its
24 own subjective personnel decisions, regardless of whether or
25 not you agree with the decision, and can make a decision about

1 an employee for any reason that is not discriminatory,
2 retaliatory, or otherwise illegal.

3 It is not your function as jurors to second-guess
4 decisions Aclara made with regard to Mr. Rufo if those
5 decisions were otherwise lawful. Likewise, you may not find
6 for Mr. Rufo and against Aclara just because you may disagree
7 with Aclara's stated reasons for their decisions with regard to
8 Mr. Rufo, or because you believe that a decision was harsh or
9 unreasonable. Instead, your function is to determine only
10 whether in making its decisions retaliation was the motivating
11 factor in any of those decisions.

12 I'm now going to instruct you on damages, and just
13 because I am instructing you on how to award damages does not
14 mean that I have any opinion on whether or not Aclara should be
15 held liable.

16 If you find by a preponderance of the evidence that
17 Aclara intentionally retaliated against Mr. Rufo for engaging
18 in protected activity, then you must consider the issue of
19 compensatory damages. You must award Mr. Rufo an amount that
20 will fairly compensate him for any injuries he actually
21 sustained as a result of Aclara's conduct. The damages that
22 you award must be fair compensation, no more and no less. The
23 award of compensatory damages is meant to put Mr. Rufo in the
24 position he would have occupied if the discrimination had not
25 occurred. Mr. Rufo has the burden of proving his damages by a

1 preponderance of the evidence.

2 Mr. Rufo must show that the injury would not have
3 occurred without retaliation by Aclara. Mr. Rufo must also
4 show that retaliation by Aclara played a substantial part in
5 bringing about the injury and that the injury was either a
6 direct result or a reasonably probable consequence of Aclara's
7 acts.

8 This test -- a substantial part in bringing about the
9 injury -- is to be distinguished from the test you must employ
10 in determining whether Aclara's actions were caused by
11 retaliation. In other words, even assuming that Aclara's
12 actions were caused by retaliation, Mr. Rufo is not entitled to
13 damages for an injury unless Aclara's retaliatory action
14 actually played a substantial part in bringing about that
15 injury.

16 In determining the amount of any damages that you
17 decide to award, you should be guided by common sense. You
18 must use sound judgment in fixing an award of damages, drawing
19 reasonable inferences from the facts in evidence. You may not
20 award damages based on sympathy, speculation, or guesswork.

21 You may award damages for any pain, suffering,
22 inconvenience, mental anguish, or loss of enjoyment of life
23 that Mr. Rufo experienced as a consequence of Aclara's alleged
24 retaliation if proven. No evidence of the monetary value of
25 intangible things such as pain and suffering has been or need

1 be introduced into evidence. There is no exact standard for
2 fixing the compensation to be awarded for these elements of
3 damage. Any award you make should be fair in light of the
4 evidence presented during the trial.

5 You may award damages for losses that Mr. Rufo may
6 suffer in the future as a result of Aclara's retaliation. For
7 example, you may award damages for loss of earnings resulting
8 from any harm to Mr. Rufo's reputation that was suffered as a
9 result of Aclara's retaliation. Where a victim of retaliation
10 has been terminated by an employer and has sued that employer
11 for retaliation, he may find it more difficult to be employed
12 in the future, or may have to take a job that pays less than if
13 the retaliation had not occurred.

14 That element of damages is distinct from front pay,
15 or the amount of wages Mr. Rufo would have earned in the future
16 from Aclara if he had retained his job there. The jury may not
17 award front pay damages, as that issue is decided by the Court,
18 if Aclara is found liable for retaliation.

19 As I instructed you previously, Mr. Rufo has the
20 burden of proving his damages by a preponderance of the
21 evidence, but the law does not require that Mr. Rufo prove the
22 amount of his losses with mathematical precision; it requires
23 only as much definiteness and accuracy as the circumstances
24 permit.

25 In assessing damages, you must not consider attorney

1 fees or the costs of litigating this case. Attorney fees and
2 costs, if relevant at all, are for the Court and not the jury
3 to determine. Therefore, attorney fees and costs should play
4 no part in your calculation of any damages.

5 If you find that Aclara intentionally retaliated
6 against Mr. Rufo, you may also award him back pay damages, that
7 is, an amount that reasonably compensates Mr. Rufo for any lost
8 wages and benefits, taking into consideration any increases in
9 salary and benefits, including pensions, that Mr. Rufo would
10 have received from Aclara had Mr. Rufo not been the subject of
11 Aclara's intentional retaliation.

12 Back pay damages, if any, apply from the date Aclara
13 took a materially adverse employment action against Mr. Rufo
14 until the date of your verdict.

15 You must reduce any back pay award by the amount of
16 the expenses that Mr. Rufo would have incurred in making those
17 earnings.

18 If you award back pay, you are instructed to deduct
19 from the back pay figure whatever wages Mr. Rufo has obtained
20 from other employment during this period. Mr. Rufo has the
21 burden of proving back pay damages by a preponderance of the
22 evidence.

23 Now, you are instructed that Mr. Rufo has a duty
24 under the law to mitigate his damages. That means that
25 Mr. Rufo must take advantage of any reasonable opportunity that

1 may have existed under the circumstances to reduce or minimize
2 the loss or damages caused by Aclara.

3 Aclara has the burden of proving that Mr. Rufo has
4 failed to mitigate his damages. So if Aclara persuades you by
5 a preponderance of the evidence -- and it's that same standard
6 I'm going to define for you in a second -- that Mr. Rufo failed
7 to take advantage of an opportunity that was reasonably
8 available to him, then you must reduce the amount of Mr. Rufo's
9 damages by the amount that could have been reasonably obtained
10 if he had taken advantage of such an opportunity.

11 Mr. Rufo claims that Aclara acted with malice or
12 reckless indifference to his federally protected rights and
13 that as a result, there should be an award -- an additional
14 award of damages, which we'll address later, but a finding of
15 malice or reckless indifference against Aclara is permissible
16 in this case only if you find by a preponderance of the
17 evidence that a management official of Aclara personally acted
18 with malice or reckless indifference to Mr. Rufo's federally
19 protected rights. You are instructed that Michael Garcia, Lyn
20 Salvo, Gina Petrella, and Jill Mecey are management employees
21 of Aclara.

22 An action is with malice if a person knows that it
23 violates federal law prohibiting retaliation and does it
24 anyway. An action is with reckless indifference if taken with
25 knowledge that it may violate the law.

1 However, even if you make a finding that there has
2 been an act of retaliation, you cannot make a finding of malice
3 or reckless indifference against Aclara if Aclara proves by a
4 preponderance of the evidence that it made a good faith attempt
5 to comply with the law.

6 Now, throughout these instructions, I have referred
7 to the burden of proof that the parties have on specific issues
8 as being by the "preponderance of the evidence." That standard
9 of proof requires proving in light of all the evidence that
10 what is claimed is more likely true than not true.

11 In determining whether any fact has been proved by a
12 preponderance of the evidence in the case, you may unless
13 otherwise instructed consider the testimony of all witnesses,
14 regardless of who may have called them, and all exhibits
15 received in evidence, regardless of who may have produced that
16 evidence.

17 You may have heard the term "proof beyond a
18 reasonable doubt." That's a burden of proof in a criminal
19 case. That is a stricter standard of proof. It does not apply
20 to this case, so you should put that out of your mind.

21 Just one other way of thinking about the
22 preponderance of the evidence, if you turn behind you, there's
23 a balance scale sitting on the, on the counter there. I'm sure
24 you've all seen a balance scale. So the party that has the
25 burden of proof on a particular issue, all right, has to have

1 that scale tip in the party's favor.

2 So what you do on each issue is you look at the
3 evidence that favors each side, and you put the evidence on the
4 scales. If the party with the burden of proof, if the scales
5 tip in that party's favor, and it only to be a feather weight
6 but it has to tip, then the party has met the burden, all
7 right? If it's fifty-fifty, if the scales are absolutely
8 equal, the party with the burden of proof does not win on that
9 issue because they have not produced the greater weight of the
10 evidence, all right?

11 And obviously, if the evidence tips in favor of the
12 other party, the party with the burden of proof does not win.
13 So if a party -- and both parties in this case have different
14 burdens -- have the same burden of proof but on different
15 issues. So for the issue where a particular party has the
16 burden of proof, for them to win on that issue, the scales must
17 tip in their favor to some degree.

18 We've reached the last instruction. I know these
19 take a while.

20 Upon retiring to your jury room to begin your
21 deliberations, the first order of business is for you to elect
22 one of your members to be the foreperson. Now, the foreperson
23 will preside over your deliberations and will be your
24 spokesperson here in court, but remember the first instruction
25 or one of the early ones I gave you at the beginning of the

1 trial: You are eight coequal judges, so the fact that one of
2 you is going to be the foreperson does not mean that his or her
3 opinion is more worthy of consideration than any of the other
4 jurors, but we do need for administrative purposes one person
5 who can sort of manage things.

6 Now, your verdict must represent the collective
7 judgment of the jury. In order to return a verdict, it is
8 necessary that each juror agree to it. Your verdict, in other
9 words, must be unanimous.

10 It is your duty as jurors to consult with one another
11 and to deliberate with one another with a view towards reaching
12 an agreement if you can do so without violence to your own
13 individual judgment. Each of you must decide the case for
14 yourself, but do so only after an impartial consideration of
15 the evidence in the case with your fellow and sister jurors.

16 In the course of your deliberations, do not hesitate
17 to reexamine your own views and to change your opinion if
18 convinced it is erroneous. Do not surrender your honest
19 conviction, however, solely because of the opinion of your
20 fellow or sister jurors or for the mere purpose of thereby
21 being able to return a unanimous verdict.

22 Remember at all times you're not partisans. You
23 don't represent Mr. Rufo, and you don't represent Aclara
24 Technologies, LLC. Instead, you are judges, specifically,
25 judges of the facts of this case, and your sole interest is to

1 seek the truth from the evidence received during the trial.

2 Your verdict must be based solely upon the evidence
3 received in the case. Nothing you have seen, read, or heard
4 outside of the courtroom may be considered. Nothing that I
5 have said or done during the course of this trial is intended
6 in any way to somehow suggest to you what I think your verdict
7 should be. And nothing said in these instructions and nothing
8 in the form of a verdict are to suggest or convey to you in any
9 way what your verdict should be. What the verdict shall be is
10 the exclusive duty and responsibility of the jury. As I've
11 said many times, you are the sole judges of the facts.

12 Now, we've prepared a verdict form for you. You've
13 actually seen it, but I'm going to go over it with you again.
14 It has the caption of the case, and it has the case number, and
15 then it has the following.

16 The first question: Do you find by a preponderance
17 of the evidence in favor of plaintiff, Joseph Rufo, on his
18 claim of retaliation, in violation of 42 U.S.C., Section 1981?

19 And you're going to indicate either yes or no, and
20 you can do it with a check mark or an X, but that must be
21 clear.

22 Now, if you find yes, then you have two more
23 questions to answer. If you say no, that ends your decision,
24 and the foreperson will then sign his or her signature. We ask
25 the foreperson to print his or her name because we often can't

1 read your signature, and then the date the decision is made.
2 So today, believe it or not, is November 1. If -- there won't
3 be time today, but if -- tomorrow would be November 2.

4 Now, if the jury found yes, that is, if you do find
5 that Mr. Rufo has proven his claim for retaliation, the next
6 question you need to answer is what sum of money would fairly
7 and reasonably compensate the plaintiff for the damages, if
8 any, that you have found defendant, Aclara Technologies, caused
9 him?

10 And we first ask you to indicate what, if any, back
11 pay you find, and that is defined as wages and benefits from
12 June 4, 2018, to the present.

13 And the next category, pain and suffering,
14 inconvenience, mental anguish, and loss of enjoyment of life.

15 And then we would ask you to add those two numbers,
16 so that the final number would be write the total of the
17 amounts you indicate, just to make sure that we're clear about
18 that.

19 And the third and last question is do you find by a
20 preponderance of the evidence that Aclara acted with malice and
21 reckless indifference to Mr. Rufo's rights protected by Title
22 42, United States Code, Section 1981? And there you'll just
23 indicate yes or no.

24 So that's the verdict form.

25 Now, when you go in to your deliberations, you're

1 going to have a couple of copies of the jury instructions. We
2 have to make corrections to them and get them back to you. You
3 will have all of the physical exhibits that have been entered
4 into evidence.

5 I've asked the lawyers to produce an index, each
6 side, an index of the exhibits that have been entered into
7 evidence, so you'll have the exhibit number and a little bit of
8 a description, so you should be able to find them pretty
9 quickly, and you'll have one copy of the verdict form.

10 Now, during the course of your deliberations, it's
11 very important that, number one, you never discuss how your
12 deliberations are going with anybody. You don't tell my court
13 security officer, you'd never tell me, and you certainly don't
14 tell anybody outside of the courthouse or the courtroom.

15 If you need to communicate with the Court, that is,
16 if you have a question or something you want to bring to the
17 Court's attention, the procedure is to write a note. Usually
18 the foreperson will write it and sign it, fold it over, and let
19 Mr. Hendrick know that you've got a note for the Court.

20 Now, my practice is to require that at least one
21 lawyer per side must stay on this floor throughout the time
22 that a jury is deliberating, and that is because if you have a
23 question, I can't answer your question without clearing it with
24 counsel, and if I let them go back to their office, you might
25 have to wait half an hour before I can get an answer to you,

1 and we try not to waste your time.

2 Because of that requirement that they be here, I
3 always want jurors to let us know when you're not deliberating.
4 So, for example, as you think about your schedule tomorrow, you
5 know, if you're going to take a morning coffee break the way
6 we've been doing, around 11:00 or 11:15, if you'll let us know
7 coffee break for 15 minutes, then I can let the lawyers leave
8 the floor. The same way you decide about how you want to do
9 lunch, knowing that you're going to have an hour lunch, or you
10 could take a half-hour lunch, or you could take a two-hour
11 lunch, your schedule is going to be your own once you get
12 started with deliberations, but we just need to know when
13 you're not deliberating.

14 The other important thing is to remember that jury
15 deliberation is a collective thinking process. We have eight
16 judges in that room, and so it's really important that each of
17 you when you express your views about things are being listened
18 to by the other seven jurors. So if a juror, for example, is
19 in the restroom or has run downstairs to grab something, you
20 need to stop deliberating because it would not be fair if some
21 of you were talking and one of the jurors was not in the room
22 hearing that. So that's how I want to make sure you're careful
23 in terms of your deliberations.

24 And when you have finally reached a decision and have
25 filled out the verdict form, you fold it over, knock on the

1 door, let Mr. Hendrick know that you've reached a verdict, and
2 then we'll bring you back in.

3 All right. Counsel, approach the bench.

4 (Bench conference on the record.)

5 THE COURT: It was either late at night or you-all
6 didn't read the instructions, but you saw I had a bias one. I
7 had to correct that because it was for a criminal case, the
8 bias instruction. So I'll clean that up before it goes to the
9 jury, okay?

10 MR. FOX: Thank you.

11 THE COURT: Any objection to the charge as given?

12 MR. FOX: No, Your Honor.

13 THE COURT: Any objection other than what you
14 indicated before?

15 MR. ROLLINS: Only the objection previously stated
16 about prior to the charge that was given.

17 THE COURT: That's fine. Then we're all set to go,
18 all right? How much time is it going to take for you-all to
19 get your exhibit lists done, the index? Or do you think
20 your -- do you think they're ready to go to the jury now?

21 MR. FOX: Yeah. I think they're done, aren't they,
22 as far as I know.

23 MR. ROLLINS: We'll need to update ours for the new
24 exhibits that were entered today.

25 THE COURT: Okay.

1 MR. ROLLINS: But it won't take very long. I don't
2 think there were a tremendous number that were admitted today.

3 THE COURT: I don't care if you do it by hand. It's
4 only -- no it's 6:00. I'll send the jury home for tonight,
5 okay?

6 MR. FOX: Okay.

7 MR. ROLLINS: Okay.

8 THE COURT: All right. We'll stay in session. I
9 want to get all the exhibits taken care of tonight, all right?
10 Thank you.

11 (End of bench conference.)

12 THE COURT: Ladies and gentlemen, what I'd like you
13 to do -- and you're going to be getting out of here in a couple
14 of minutes because it's almost 6:00, and it will take us a few
15 minutes yet to pull the exhibits together and get them to you.
16 The best thing would be to go in the jury room now, decide who
17 is going to be the foreperson, and then decide among yourselves
18 decide how you want to run tomorrow. That is, you can start as
19 earlier as 8:00. That's as early as the building opens up.
20 You can start at ten. You can start whatever time you want,
21 but you need to, obviously, agree because you can't start
22 deliberating until all eight of you are together, all right?

23 We'd also like to know, if you could, approximately
24 what your time schedule looks like tomorrow, if you want to
25 stay on the same schedule and have lunch at 1:00, if you want a

1 shorter lunch period. It's just nice for planning purposes.

2 I have a regular docket at 9:00 in this courtroom.
3 We will interrupt that docket if you have questions or issues.
4 But when you come in tomorrow morning, you'll have in the jury
5 room, I think given there are eight of you, I'll give you three
6 sets of the jury instructions. You'll have the verdict form,
7 all the exhibits. You will have indexes for these exhibits,
8 and we will get you a playback unit if you need to listen to
9 the recordings, all right? And then if you have any -- and
10 you'll have your notebooks, which again, leave here tonight,
11 but you can have the benefit of your notebooks for your memory.

12 So we're going to stay in session. We have some
13 housekeeping matters to do with the exhibits, but if you could
14 decide what time you're going to start tomorrow morning and who
15 the foreperson is and then just send that to us on a note, I'll
16 bring you back in one more time just to make sure you have
17 final instructions this evening, but why don't you go back to
18 the jury room right now, all right?

19 (Jury out.)

20 THE COURT: All right. So while we're, while we're
21 waiting for the jury to come back in, I'm going to have
22 Ms. Guyton slowly start reading to you the exhibits which her
23 notes show are in, and you-all need to be listening carefully,
24 because this is, this is the time to clarify the record in that
25 respect, all right?

1 THE CLERK: Plaintiff's exhibits: No. 1, No. 4, 5,
2 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 22,
3 22A, 23, 24, 25, 26, 27, 28, 31, 32, 33, 34, 34A, 34B, 34C, 35,
4 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 48, 49, 52, 53, 54,
5 55, 56, 60, 61, 62, 63, 66, 68, 70, 71, 72, 73, 74, 78, 79, 80,
6 81, 82, 83, 84, 87, 88, 89, 94, 96, 99, 101, 102, 105, 111,
7 112, 113, 118, 119, 120, and 122.

8 THE COURT: All right. Now, does the plaintiff think
9 there are any other exhibits that you entered into evidence
10 that are not recorded there?

11 MR. HOROWITZ: No, Your Honor.

12 THE COURT: All right. Then I -- all right. Let's
13 hear now from the defense.

14 THE CLERK: Defendant's exhibits: D-213, D-214,
15 D-219, D-223, D-224, D-229, D-231, D-251, D-252, D-254, D-255,
16 D-258, D-269, D-275, D-277, D-281, D-282, D-284, D-290, D-296,
17 and D-302.

18 THE COURT: Does the defense think you entered any
19 other exhibits that are not listed here?

20 MR. ROLLINS: If we could have one moment, Your
21 Honor?

22 THE COURT: Yes.

23 MR. ROLLINS: Your Honor, we have --

24 (Knock on jury room door.)

25 THE COURT: Wait, wait, wait. Hold on one second.

1 We've got a knock on the door.

2 We're going to have to give them some paper. Those
3 are little, tiny notes.

4 THE COURT SECURITY OFFICER: Yes, ma'am.

5 THE COURT: Okay. All right. Mr. Levine is the
6 foreperson, and they want to start at 9:30 tomorrow morning.
7 They're going to take a 15-minute break at 11:00, a half-hour
8 lunch break from 1:00 to 1:30, and a 3:00 break in the
9 afternoon, all right? So you know who the foreperson is and
10 what the schedule is for the day.

11 So you-all are going to have to clean your --
12 remember, I have a docket tomorrow, so everything out of the
13 courtroom at this point. We're going to give you the extra
14 copies that you gave to the Court, I don't need them any
15 longer, so we'll get that back to you tonight as well.

16 And both of, both of you can go ahead and correct
17 your -- or bring up to date your index forms. Just get them
18 here tomorrow morning before -- unless you want to leave them
19 tonight before you go. But you don't have a typewriter here.
20 How would you -- the plaintiff's is completely accurate? Every
21 one of your exhibits is in, or do you need to do some modifying
22 of it?

23 MR. HOROWITZ: Your Honor, there's a few exhibits on
24 our original list that were not used or admitted. We can
25 either black those out or we can submit a new list.

1 instructions.

2 So, Mr. Levine, we appreciate your getting the note
3 to us for your schedule tomorrow, and I -- we'll get you some
4 more paper. You don't have to use little, tiny pieces like
5 this, all right?

6 Remember, it's even more important now that you
7 continue to follow my instructions, and that is, you're not to
8 be even thinking about the case tonight. Just go home and get
9 a good night's sleep. Don't e-mail each other. Don't try to,
10 you know, have any communications about the case. Do not
11 conduct any investigation.

12 I, again, don't think there should be anything in the
13 newspapers about any issues related to this kind of a case, but
14 stay away from anything that might contaminate your thought
15 process. Again, you've been a great jury, always getting here
16 on time, but remember, if one of you is late, it's going to
17 hold up all the rest of the group.

18 We'll get some fresh paper in there for you as well
19 because it doesn't look like you have enough to work with here.
20 And if you need, you know, Magic Markers or anything,
21 everything goes by a note. You can't just ask my court
22 security verbally. We have to have a written note for any
23 communication, all right?

24 All right. Then you're all free to go. We'll see
25 you tomorrow morning at 9:30, okay?

1 (Jury out.)

2 THE COURT: I think there was an issue or a question?

3 MR. HOROWITZ: Yes, briefly, Your Honor.

4 THE COURT: Yes.

5 MR. HOROWITZ: I apologize for not raising this
6 before, but I remembered that we have two exhibits that have
7 been admitted into evidence in their native Excel and
8 PowerPoint forms. Shall we submit that to the courtroom deputy
9 along with the audio files, or is there a different way that
10 Your Honor would prefer that we handle that?

11 THE COURT: Well, the jury, if they want to see it,
12 which exhibit is that?

13 MR. HOROWITZ: It's 34B and C, I believe.

14 THE COURT: That creates a problem. You're going to
15 have to put them in a format that the jury can get. Either
16 print it out or put it on a disc that they can play on the
17 computer.

18 MR. HOROWITZ: Okay.

19 THE COURT: All right?

20 MR. HOROWITZ: We will do that.

21 THE COURT: All right? And just make sure it's a
22 clean disc so there's nothing else on it.

23 Let me just see what we're talking about.

24 MR. HOROWITZ: Your Honor, it may be helpful if
25 Mr. Katz could address the Court on this issue.

1 THE COURT: Well, these are, these are fancy, fancy
2 copies of the report, aren't they?

3 MR. HOROWITZ: Yes, Your Honor.

4 THE COURT: We've already got it in in a different
5 format. There's no reason to -- we're not going to do it two
6 or three times, if that's what you're trying to do.

7 MR. HOROWITZ: No. We will just use it as is in the
8 binder. Thank you, Your Honor.

9 THE COURT: Much better. Yes, okay.

10 All right. Anything else?

11 (No response.)

12 THE COURT: No? All right. Then you-all have to
13 clean up the courtroom a little bit, and we'll recess court
14 until 9:30 tomorrow morning. 9:00 tomorrow morning for us.

15 (Recess from 6:05 p.m., until 9:30 a.m., November 2, 2018.)

16

17 CERTIFICATE OF THE REPORTER

18 I certify that the foregoing is a correct transcript of
19 the record of proceedings in the above-entitled matter.

20

21

22

/s/

Anneliese J. Thomson

23

24

25